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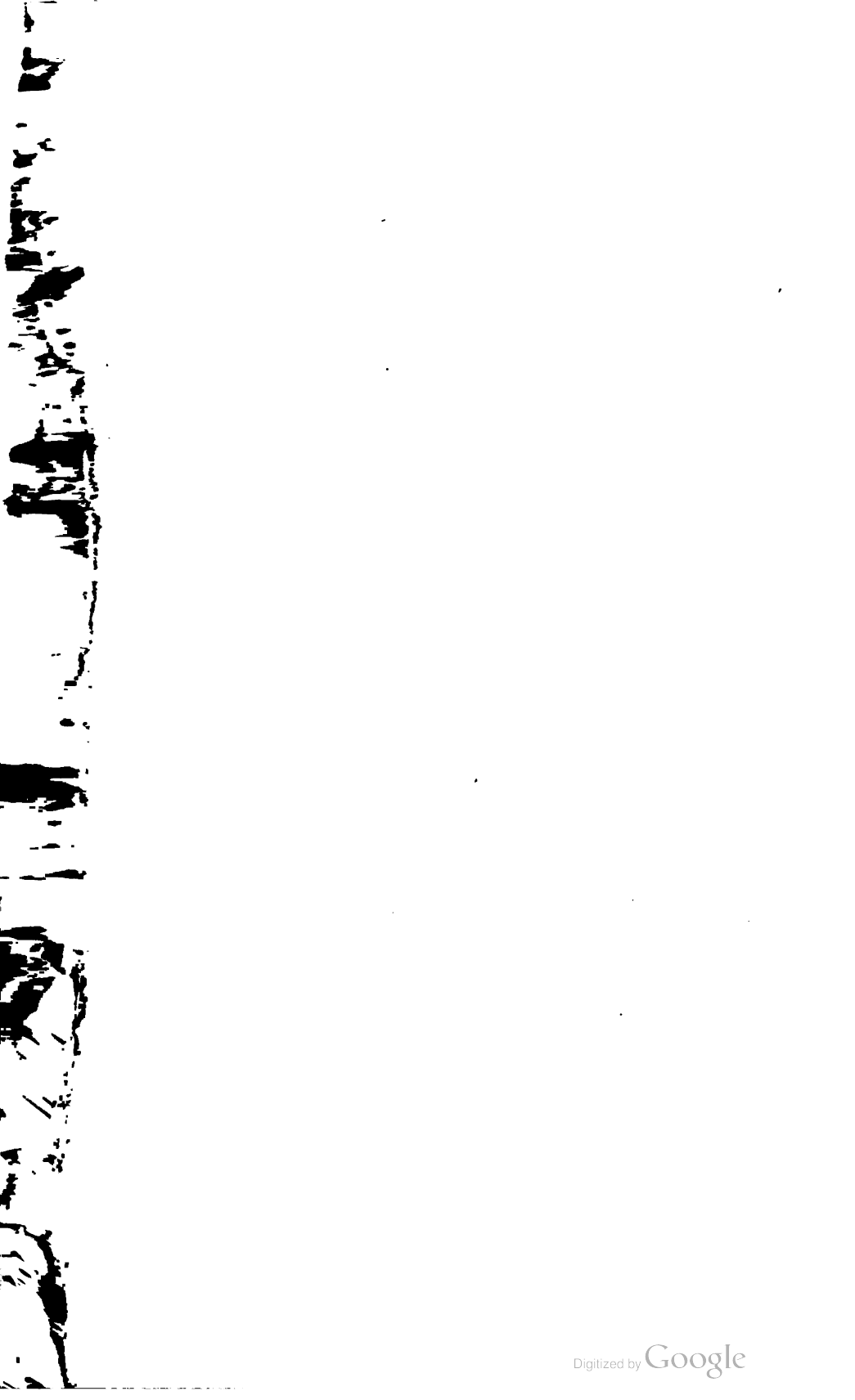
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Sept. 22

CONNECTICUT REPORTS: 26

BEING REPORTS OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

VOL. LIII.

BY JOHN HOOKER.

PUBLISHED FOR THE STATE OF CONNECTICUT,
BY BANKS & BROTHERS,
144 NASSAU STREET, NEW YORK.
1886.

Entered according to Act of Congress, in the year 1886, for the State of
Connecticut,

By CHARLES A. RUSSELL, SECRETARY OF THE STATE,
In the office of the Librarian of Congress, at Washington.

rec. Aug. 10, 1886

The Statute Book referred to in this volume as the Revised Statutes or General Statutes, is the Revision of 1875.

JUDGES
OF THE
SUPREME COURT OF ERRORS
DURING THE TIME OF THE WITHIN DECISIONS.

HON. JOHN DUANE PARK, CHIEF JUSTICE.

HON. ELISHA CARPENTER.

HON. DWIGHT WHITEFIELD PARDEE.

HON. DWIGHT LOOMIS.

HON. MILES TOBEY GRANGER.

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SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

HELD AT BRIDGEPORT FOR THE COUNTY OF
FAIRFIELD,

ON THE THIRD TUESDAY OF MARCH, 1885.

Present,

PARK, C. J., CARPENTER, LOOMIS AND GRANGER, JS.

53	1
57	586
53	1
66	438

FREDERICK O. SEELEY *vs.* THE CITY OF BRIDGEPORT.

Under the provision of the state constitution that "the right of trial by jury shall remain inviolate," it is not necessary that a hearing in damages upon a default in an action for a tort should be before a jury, the practice of assessing such damages by the court having been long established at the time of the adoption of the constitution.

In an action against a city for an injury from a defective sidewalk, the question was where the line of the street ran along an open space in front of a store. The street had been an ancient town highway, but had never been formally laid out, so far as the records showed. Held that the line of the street as marked by a line of occupancy of the land above and below the place in question, might be shown, as evidence of the line at the place in question.

And held that the evidence need not be limited to the next occupancy on each side, but that evidence of the line of occupancy still further off, though of less weight, was yet admissible; there being a presumption that if the street had been formally laid out it would have been laid out along continuous lines, and that if it became a street by dedication and public use, such dedication and use were presumably along such continuous lines.

[Argued March 18th—decided May 4th, 1885.]

ACTION for an injury from a defective sidewalk of the defendant city; brought to the Superior Court. The de-

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Seeley v. City of Bridgeport.

defendants having suffered a default, the plaintiff moved for a jury to assess the damages. The court (*Andrews, J.*) overruled the motion and heard the case, found the facts, and assessed the damages at \$60. Appeal by the plaintiff on the ground of error in this ruling of the court and in the admission of evidence. The case is sufficiently stated in the opinion.

D. B. Lockwood and *H. S. Sanford*, for the appellant.

R. E. DeForest and *C. Sherwood*, for the appellees.

GRANGER, J. This is a civil action claiming damages for an injury received by the plaintiff from a fall upon a sidewalk of the defendant city left in a dangerous condition through the negligence of the defendants. The defendants suffered a default and were heard in damages. Before the hearing the plaintiff filed a motion to have the damages assessed by a jury. The judge overruled the motion and assessed the damages at sixty dollars. The first reason assigned by the plaintiff upon his appeal is the error of the court in this ruling.

The counsel for the plaintiff claim that under the provision of the constitution that "the right of trial by jury shall remain inviolate," his right to a trial of his case by a jury cannot be taken away; but, as has been repeatedly held, this provision of the constitution secures the right of trial by jury only where it existed when the constitution was adopted. It does not create the right; it only preserves it. But it had never been the practice to have damages upon a default assessed by a jury. It had always been done by the court. This provision of the constitution has therefore no application to the case. 2 Swift's System, 268; 1 Swift's Digest, 784; *Cockran v. Leister*, 2 Root, 348; *Raymond v. Danbury & Norwalk R. R. Co.*, 43 Conn., 596; *Batchelder v. Bartholomew*, 44 id., 502; *Shepard v. New Haven & Northampton Co.*, 45 id., 58.

Another error is assigned as a ground of appeal, in the ruling of the court as to the admissibility of certain evi-

Seeley v. City of Bridgeport.

dence. It appears by the finding of the court that the defendants claimed that the place where the plaintiff slipped was outside of the limits of Main Street and on land belonging to the People's Savings Bank, and that it was open to travel not for the purposes of a sidewalk but for the accommodation of people going to a store in the building. This evidence was of course admissible, it being only claimed by the plaintiff that it was a part of the sidewalk and of course that the defendants were bound to keep it in a safe condition; and it not being claimed that it was a dangerous place outside of the sidewalk, but so near as to make it the duty of the defendants to protect the public against it by a railing. *Beardsley v. City of Hartford*, 50 Conn., 529. This point being proper to be proved the question is, whether the evidence offered for the purpose was in its nature admissible. It appears that Main Street, where the accident occurred, was originally a town highway, and that there was no survey or record fixing its limits. The question was where was its east line. In the absence of anything else to determine it, it would be taken to be that line up to which the public on the one side had used the way to travel over, and up to which adjoining proprietors had occupied or used the land on the other side. To show where that line was in front of the bank building, the defendants offered evidence to show where it clearly was, as marked by buildings or fences, north and south of the bank building. The plaintiff objected to this evidence unless limited to the property immediately adjacent or very near to the bank building. But the evidence was in its nature admissible, and was none the less so that it was not limited to the adjacent property. Any indications of the line remoter than the adjacent property would of course become of less importance in determining the line at the place in question, but this would be, within reasonable limits, only a question of the weight of the evidence, not of its admissibility. The presumption would be, if the highway had been originally laid out by formal proceedings and all record of the lay-out lost, that the line was a continuous one, substantially

 Appleton v. Norwalk Library Corporation.

straight; and if the highway had become such by dedication and the acceptance of the public, there would be equally a presumption that the dedication had been made upon a continuous line, and the use of the public, constituting an acceptance of the highway, had been along a continuous course and within continuous lines. It was therefore entirely proper that the east line of the street for some distance north and south of the place of the injury, if ascertainable, should be considered in determining where the line ran at the place in question.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

53	4
54	83
53	4
58	475
53	4
60	407
53	4
63	296
53	4
77	278

 WILLIAM W. APPLETON AND OTHERS *vs.* THE NORWALK
LIBRARY CORPORATION.

The plaintiffs and defendants made a contract by which the plaintiffs were to sell the defendants a complete set of a certain work for ninety dollars, the defendants paying twelve dollars on delivery of the books and six dollars every other month thereafter until the whole was paid; the right of property to remain in the plaintiffs till the whole was paid, and on failure to pay any installment within thirty days after due, all remaining installments were immediately to become due and payable; the plaintiffs having the option to take back the books and to retain all the installments previously paid. Held that the right to take back the books was one that belonged to the plaintiffs alone and did not give the defendants the right to return them; that the agreement of the defendants to take and pay for the books was absolute; and that on default of payment of any installment the plaintiffs had a right to sue for and recover the whole of the ninety dollars that remained unpaid.

[Argued March 18th—decided May 4th, 1885.]

ACTION to recover the balance due on a contract for the purchase of certain books; brought, by appeal from a justice of the peace, to the Court of Common Pleas, and heard in that court, upon a demurrer of the plaintiffs to the defendant's answer, before *Hall, J.*

Appleton v. Norwalk Library Corporation.

The plaintiffs were publishers under the name of D. Appleton & Co. The contract for the purchase by the defendant of a set of the American Cyclopedia and Index, is fully given in the opinion of the court. This contract was set out in the complaint, which alleged the delivery of the books by the plaintiffs and that the defendant had failed to pay the installments agreed, leaving a balance of \$78 due the plaintiffs. The defendant made the following answer:—

The defendant admits that, under the provisions of the contract described in the plaintiffs' complaint, it received of the plaintiffs the property therein described, and says that it paid the plaintiffs the sum of twelve dollars in advance, and the first two installments of six dollars each, as provided in said contract, and also admits that it has paid no more. The defendant further says that, on or about the 20th day of January, 1884, and before the bringing of this suit, the defendant notified the plaintiffs that it would make no further payments under said contract, but would deliver up to the plaintiffs said property in as good condition as the same was in when received by the defendant, reasonable use and wear thereof excepted; and then and there offered to the plaintiffs so to deliver up to them said property in condition as aforesaid. And the defendant is now, and ever since has been, ready so to deliver said property to the plaintiffs, but the plaintiffs have at all times refused to receive the same.

To this answer the plaintiffs demurred. The court held it sufficient and rendered judgment for the defendant. The plaintiffs appealed.

S. Warner, for the appellants.

The parties by their contract expressly provided that if any installment should remain unpaid thirty days after it became due "all of said installments remaining unpaid should immediately become due and payable." After all the installments had been due more than thirty days this suit was brought to recover them, and the court below

Appleton v. Norwalk Library Corporation.

adjudged that the plaintiffs could not recover, holding the cases of *Hine v. Roberts*, 48 Conn., 267, and *Loomis v. Bragg*, 50 id., 228, to govern the case at bar. We claim they do not. In neither of those cases was there a provision in the contract that upon a failure to pay any installment all should become due. Those contracts only provided that the seller might retake the property, and that the buyer should have no claim to recover the money paid. That was the only remedy given for a breach of the contract. In this case that remedy is given to the seller, and he may avail himself of it or not, *at his option*; but another remedy is also given him,—to sue for the money. He cannot have both. He may have either; and he elects to sue. The construction contended for by the defendant, and adopted by the court below, gives no effect to the words “all of said installments remaining unpaid shall immediately become due and payable.” Why provide that they should “become due and payable” if they could not be collected?

J. S. Seymour, for the appellee.

The contract on which this suit is based is, in all essential respects, like the two that have been already before this court, in which the rights of the parties have been clearly defined, and particularly the right to surrender the books at any time instead of continuing the payments. *Hine v. Roberts*, 48 Conn., 267; *Loomis v. Bragg*, 50 id., 228. The contract is an agreement to sell a set of books for \$90 in bi-monthly installments of six dollars each, upon condition that if at any time the defendant shall make default of payment, when any installment shall become due and remain unpaid for thirty days the plaintiffs shall have the right to take the books back into their possession and that whatever sums shall have been paid shall become their property. The defendant made payments to the amount of twenty-four dollars, and then declined to make further payments, and so notified the plaintiffs, and tendered to them the books in question. The contract provides for this contin-

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gency by a forfeiture of all the defendant's rights under the contract and of the sums of money that have been paid. See also *Brown v. Haynes*, 52 Maine, 578; *Everitt v. Hall*, 67 id., 497.

PARK, C. J. This case depends upon the construction to be given to a certain contract, entered into between the parties, the important part of which to be considered is as follows:—"In consideration of the delivery of one complete set of the American Cyclopaedia and Index, the undersigned agrees to pay D. Appleton & Co. as follows: on delivery of the set the sum of \$12, and on the first day of every other month thereafter the sum of \$6, until D. Appleton & Co. shall receive the full sum of \$90; it being expressly agreed that the right of property in said books shall remain in said D. Appleton & Co. until the same are wholly paid for; and in case of failure to pay any one of said installments for thirty days after the same has become due, all of said installments remaining unpaid shall immediately become due and payable, or the said D. Appleton & Co. may, at their option, take or cause to be taken the said books, either with or without process of law, from the possession of the said subscriber, or other representative to whom he may have delivered the same, without recourse against said D. Appleton & Co. for any money paid on account therefor; it being expressly understood that in the latter case the money so paid on account shall be for the use and wear of said books."

The books were delivered and the defendants paid a number of installments according to the contract; but finally they ceased payment, and tendered the books to the plaintiffs, informing them that they should make no further payments under the contract. The plaintiffs refused to receive the books, and after sufficient time had elapsed for all the installments to become due and payable, brought this suit.

These facts are stated in the defendants' answer, and the

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whole question is, do they constitute a defense to the plaintiffs' claim?

This contract is an absolute one. The plaintiffs agreed to sell the books to the defendants for the sum of ninety dollars to be paid in installments at certain specified times. The defendants agreed to pay that sum according to the terms of the contract. There is no conditional agreement here. It is true that the title to the goods did not pass, and could not pass until the full sum of ninety dollars had been paid, but the promise to pay that sum was absolute. Whence then comes the defendants' right to return the books in full satisfaction and discharge of the contract, and thus leave a great part of the installments unpaid?

It is said that the plaintiffs had the right, at their option, to retake the property at any time if the defendants should fail to pay any installment for a period of thirty days after it became due. But this is a right which the plaintiffs had, in case the defendants should break the contract by non-payment. It gives the defendants no right to return the books. It is true that if this was the only remedy which the plaintiffs had under the contract upon non-payment, as was the case in *Hine v. Roberts*, 48 Conn., 267, and in *Loomis v. Bragg*, 50 id., 228, the plaintiffs would have to abide by it and content themselves with it. But this is not their only remedy. The contract expressly further provides that, in case of such breach, all the remaining unpaid installments shall immediately become due and payable. If they become due and payable in consequence of non-payment, of course a suit could be maintained for their recovery.

The plaintiffs base their suit upon this right given them in the contract; and we think it can be sustained.

There is error in the judgment appealed from and it is reversed.

In this opinion the other judges concurred.

DARIUS STEVENS AND ANOTHER *vs.* THE BOROUGH OF
DANBURY.

53	9
75	249
75	251

A borough, authorized to establish water works and to take by purchase or appraisal any property necessary for the purpose, voted to procure its supply of water from a certain stream at a certain point where the dam would set the water back upon and destroy a mill privilege of the plaintiffs. The borough purchased the land necessary for the dam, but not being able to agree with the plaintiffs as to the amount to be paid them for their mill privilege, had the same legally appraised, the appraisers fixing the sum at \$3,000. Nothing further was done by the borough toward the erection of the dam, and one year after the above vote was passed the borough rescinded it and abandoned the project and gave notice of the fact to the plaintiffs. Held that the plaintiffs could not recover the \$3,000.

And held that the plaintiffs could not recover the counsel fees and other expenses incurred in the hearing before the appraisers.

[Argued March 18th—decided May 4th, 1885.]

ACTION to recover of the defendant borough damages assessed in the plaintiffs' favor for land claimed to have been taken by the borough for the construction of public water works; brought to the Superior Court. The following facts were found by the court.

The plaintiffs, on the 1st of January, 1881, were the joint owners with others of certain lands, rights and privileges described as follows:—All the land covered by the waters of Boggs Pond, and the dam at the outlet thereof, and the land on which the dam stands, and the right to control the dam, together with the right of access thereto, and in addition to the waters covered by the pond, so much of the water and land as the pond will cover when raised by a dam to a height to which the plaintiffs have a right to raise it; also the right to use all the water flowing from the pond and the stream flowing therefrom in a southerly direction through the Westville and Middle River District in said Danbury, whether said water flows from said pond or into said stream from other streams at or above the land

Stevens v. Borough of Danbury.

purchased by the borough of Danbury from Samuel Gregory and wife.

At a legal meeting of the voters of the borough of Danbury held on the 16th of July, 1880, the following vote was passed:—

“*Voted*, That the warden and burgesses and water commissioners be and are hereby authorized to procure an additional supply of water for the use of the borough from the stream running near the residence of Samuel Gregory, in accordance with the provisions of the charter of the borough and the several amendments thereto.”

On the 25th of September, 1880, the borough, in pursuance of this vote, and of the act, purchased of Samuel Gregory and wife certain lands through which the stream of water proposed to be taken by the borough flows, and below the land of the plaintiffs above described, and then entered upon and took possession of the same with the intention at some future time of erecting a dam thereon for the purpose of diverting the water rights and privileges of the plaintiffs; but the borough has never erected any such dam, nor in any way used the stream for the use and benefit of the borough.

In pursuance of the vote and of an act to supply the borough of Danbury with water for public and private purposes, passed by the General Assembly in 1860 and re-enacted in 1862, the borough by its water commissioners, on the 24th of January, 1881, made its application to Judge Carpenter of the Superior Court, for the appointment of three disinterested persons to assess under oath the amount of compensation to be paid to the plaintiffs for the taking of their property. In this application it was averred that the commissioners “had entered upon and taken” the property in question, and that by the taking of the same “damage has occurred or may be likely to occur to said respondents.” On February 7th, 1881, the judge appointed Luzon B. Morris, John H. Leeds and Frederick J. Kingsbury appraisers, and they gave due notice in writing to the plaintiffs and to the borough to appear before them at the

water commissioners' office in Danbury, on the 9th of May, 1881, to be heard relative to the matter of the application. On May 9th, and on several days thereafter, the plaintiffs and the borough appeared before the appraisers and were fully heard by them with witnesses and counsel as to the amount of damages to be awarded to the plaintiffs for the taking of their property. On May 17th, 1881, the appraisers made a report in writing of their doings in the matter, embracing their assessment of \$3,000 damages to the plaintiffs, to the clerk of the Superior Court for Fairfield County, which on that day was by him duly received and recorded in the records of the court.

The assessment of damages has never been paid by the borough to the plaintiffs, though demanded, nor has the amount been deposited with the clerk or with the treasurer of Fairfield County, for the use of the plaintiffs.

The plaintiffs are the joint owners of other premises than those described in the complaint, and situated on the same stream below the premises described, and before the appraisal had erected thereon a dam, and below the dam a raceway for the purpose of conducting the water to machinery belonging to them, both of which were remaining and used by the plaintiffs at the time of the appraisal, and were a portion of the premises included in the application of the borough of Danbury to Judge Carpenter, and the damage and injury to which were also included in the report of the appraisers.

A legal meeting of the borough was held June 29th, 1881, which was warned "to consider the propriety of instructing the warden and burgesses and water commissioners to procure an additional supply of water from what is known as the Pandanaram stream, and to pass or rescind any votes for this purpose." At this meeting the following vote was passed:—"Voted, To rescind the vote passed July 16th, 1880, authorizing the warden and burgesses and water commissioners to procure an additional supply of water for the use of the borough from the stream running near the residence of Col. Samuel Gregory."

The plaintiffs had knowledge of this meeting and of the vote.

Subsequent thereto the plaintiffs executed and delivered to other parties two deeds of portions of the estate, which were duly recorded.

The defendant never occupied or used any of the premises of the plaintiffs, nor took any physical possession thereof, nor made any entry thereon, or in any way appropriated the same or the stream for the use of the borough, otherwise than by said vote of July 16th, 1880, and the application to Judge Carpenter for the appointment of appraisers, and the subsequent proceedings thereon as hereinbefore set forth, and by the purchase from Gregory and his wife.

Upon these facts the case was reserved for the advice of this court.

L. D. Brewster and B. A. Hough, for the plaintiffs.

1. Proceedings for the condemnation of private property for public uses may be abandoned at any time *before consummation*, without rendering the municipality liable to pay the damages assessed. *After* consummation, on the contrary, the municipality has lost the right of withdrawal, and the right to the amount assessed is fixed and absolute. Mills (on Eminent Domain, sec. 812,) says:—"After a report of damages has been acted on and confirmed the party commencing proceedings for his own benefit cannot, because dissatisfied with the sum awarded, abandon the proceedings and become nonsuit, although he may at any time *before the report is confirmed*." In the note to this section, "*acceptance* is held equivalent to *confirmation*," and in sec. 814 it is said—"If a corporation delay until the judgment is entered, they lose the election to abandon." And see numerous cases cited by the author. By the 4th section of the "Water Act of the Borough of Danbury" the record of the report of the appraisers by the clerk of the Superior Court is expressly made a "final adjustment." No further or different acceptance, confirmation or judgment is au-

thorized. The report once recorded and unappealed from is a judgment final and absolute and binding on all the parties. On this point, in addition to the authorities cited by Mills, we cite:—*Neal v. Pittsb. & Connellsville R. R. Co.*, 31 Penn. St., 19; *City of Phila. v. Dyer*, 41 id., 463; *Beale v. Penn. R. R. Co.*, 86 id., 509; *People v. Syracuse Common Council*, 78 N. York, 56; *Harrington v. County Commissioners*, 22 Pick., 263; *Drury v. City of Boston*, 101 Mass., 439.

2. What is a taking? The cases on the subject of eminent domain which define what a *taking* is which concludes the parties are generally found under the headings of railroads and streets. The cases of the first class are quoted in Pierce on Railways, pages 171, 172, 209, 210. From page 172 we quote:—"In some jurisdictions the company may abandon at any time before payment; in others, only prior to the final fixing of the location; and in England, as soon as notice to treat is given." From page 210:—"In different jurisdictions the act of taking is fixed at different stages in the proceedings for condemnation, as at the time of the filing of the location in some public repository as required by statute, the time of making the assessment or award, the filing or approval of the award, the commencement of proceedings to condemn," &c. Cases of the second class are cited in 2 Dillon on Municipal Corporations, § 608, and it is there said that "proceedings may be abandoned at any time before taking possession or before the final confirmation," and in a note *In re Washington Park Comrs.*, 56 N. York, 144, and *Hawkins v. Trustees of Rochester*, 1 Wend., 54 and 318, are cited to the effect that "corporations may discontinue proceedings at any time before the report of the commissioners is finally confirmed and there is a final award in the nature of a judgment in favor of the property owners for their compensation." See also *Webb v. Rocky Hill*, 21 Conn., 468, 474; *Boston & Prov. R. R. Co. v. Midland R. R. Co.*, 1 Gray, 340, 360. We submit that cases concerning the appropriation of water should be more strictly construed against the municipality than either of the two foregoing classes, if any distinction can be made.

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It is more difficult to ascertain when the manual or physical taking occurs in the case of water rights, and in the laying out of streets the assessments are hardly *in invitum*; they are to those directly interested in the local improvement.

3. Adverse cases examined. The Maryland cases which hold that the municipality can discontinue *after* the award is confirmed, started with the leading case of *Graff v. Mayor &c. of Baltimore*, 10 Maryl., 544. But the charter there only gave the city "the use, estate and interest in the water on payment of the valuation." The doctrine which has ruled the subsequent decisions of that state was established on the language of that charter. Connected with this is the doctrine held in Maryland and very recently enunciated in the case of *Mayor &c. of Baltimore v. Hook*, 62 Maryl., 371, that no title or right to enter is acquired until compensation has been paid or tendered, or right to payment until entry is made. The similar cases in Iowa and Ohio are predicated on the peculiar language of their state constitutions requiring compensation *first*, before the title can vest or the right to enter or right to payment exists. All the other cases that we have been able to find holding abandonment after confirmation to be allowable were justified by the express language of the charter. Of the cases first cited in Mills, sec. 311, as allowing discontinuance, the first is *Stacey v. Vt. Central R. R. Co.*, 27 Vt., 39. The railroad charter provided that "on depositing the amount, &c., said company should be deemed to be seized and possessed of all such lands as have been appraised;" and the court says (page 48):—"If the land has been taken in such a manner as to vest in the company a right to the use and occupancy of it, compensation is to be made." The next, *Martin v. Mayor &c. of Brooklyn*, 1 Hill, 545, was where no report had been filed, and the filing and confirming were regarded as synonymous or of equal legal effect. The case of *Graff v. Mayor &c. of Baltimore*, 10 Maryl., 544, as we have already shown, depended on the express language of the charter. In both the Ohio cases next cited, *State v. Cin. & Ind. R. R. Co.*, 17 Ohio St., 103,

and *Dayton & Western R. R. Co. v. Marshall*, 11 id., 497, proceedings were abandoned before confirmation, and in the last case before the jury was called in. In the very able opinion in the case of *North Misso. R. R. Co. v. Lackland*, 25 Misso., 515, the court said—"the enterprise might be abandoned at any time before final judgment," and the prevailing counsel for the appellants, in his learned brief, admits that "had all the acts prescribed been consummated no discontinuance was possible or further discretion left in the matter." But as the statute required that the court should enter judgment and make an order vesting the fee simple title and no such judgment or order had been made, it was held not too late to abandon proceedings. In *Matter of Anthony St.*, 20 Wend., 618, as in *Hawkins v. Trustees of Rochester*, 1 Wend., 53, it is held that "until final confirmation proceedings may be discontinued," and that "the rule means a judgment, or confirmation final in its legal character." In *Leisse v. St. Louis & Iron Mt. R. R. Co.*, 2 Misso. App., 105, discontinuance was before trial on appeal and Judge GANTT in the opinion approves the English rule—"No discontinuance after locating." On the whole not only do the New York, Pennsylvania, Massachusetts, Vermont, New Hampshire, Maine and Wisconsin cases directly hold the doctrine for which we contend, but the cases from the other states, apparently adverse, place their decisions on grounds which show that at common law, but for the peculiar constitutions or charters of their states, they would have held the same way. The little there is of Connecticut law on this subject is in our favor. See *Moriarty v. Mason*, 47 Conn., 436, where not only the filing, but the equivalent of filing, is held conclusive as to a committee's report. See also *Webb v. Rocky Hill*, 21 Conn., 468. In *Carson v. City of Hartford*, 48 Conn., 68, there was no final action. No "final adjustment" was proved or claimed. The question was whether there had been too long delay for abandonment, and the court virtually decided that time had nothing to do with the question raised, and the cases cited are to that point and to that only.

4. Peculiar nature of the taking in this case. The "water act" in question authorizes the borough of Danbury to take and use the water of any stream in the town of Danbury, to take and hold any lands or property necessary or convenient for carrying into full effect the purposes of the act, to enter upon and make use of the ground or soil under any private or public grounds, and provides that the borough shall be liable to pay all the damages that shall be sustained by any person by the taking of any land as aforesaid, or by the construction or laying of any reservoirs, pipes, aqueducts, or other work for the purposes of the act, and if damage has occurred or may be likely to occur by reason of taking or using their land, such damages may be assessed, &c. Here the language plainly discriminates between a *taking* and the use and occupancy, and provides for damages in either case. By the vote of the water commissioners they say "we do enter upon and take the following described lands, &c." The application of the borough to the court for the appointment of commissioners alleges that they have entered upon and taken the plaintiffs' lands, property and privilege, and that damage has occurred or may be likely to. The notice to the plaintiffs sets out the taking or using as already described in the application, and the report of the appraisal returned to and recorded by the clerk of the court, sets out that the appraisal is for the *taking* described in the application. In none of the cases heretofore cited is the language of the charter or statute more clear or explicit in defining the taking, or so absolutely exclusive of any further confirmation or judgment being required after the report is filed.

5. In answer to the defendant's claim that the *taking* contemplated must mean an actual, tangible possession of some of the plaintiffs' property or privileges, some injury to his water rights by an actual diminution of the water coming to his factories, in addition to the great injustice in any case of allowing the municipality to experiment with private rights in that manner, we suggest in reply some practical difficulties in the way of such a construction in the present

case. In the first place the finding shows that the taking of the borough was not confined to an application and trial, or a mere experiment on the cost. It actually purchased lands, the initial step in procuring "an additional supply of water," and on the tract so purchased "entered and took possession with the intention at some future time of diverting the water rights of the defendants." The plaintiffs' reservoir was above, while their factory and the raceway were below the borough land on the stream. Now in what way could the plaintiffs know with certainty when the defendant first affected their water rights in the use of the stream? It is obvious that at certain seasons of the year they might divert the half of any ordinary stream for many days and not perceptibly affect the owners below, the remaining half being still more than the ordinary flow. If the test of the taking in such a case must be a perceptible, tangible injury to the plaintiffs' easement and no right to obtain payment existed in the plaintiffs until such injury was shown, the uncertainty of time at which rights ripened and became vested would render it a most impracticable and untenable test. For two curious cases involving like questions see *Bailey v. Woburn*, 126 Mass., 416, and *Dwight Printing Co. v. Boston*, 122 Mass., 583.

6. If the defendant is not liable to us for the damages assessed, we are entitled to the expenses incurred by the defendant's application and withdrawal. *North Misso. R. Co. v. Lackland*, 25 Misso., 515; *Leisee v. St. Louis & Iron Mt. R. R. Co.*, 2 Misso. App., 105; *State v. Hugg*, 44 Maryl., 116. Costs will include all costs of case and counsel fees. *Mills on Eminent Domain*, § 311; *Black v. Mayor &c. of Baltimore*, 50 Maryl., 235.

W. Burke and *G. Stoddard*, with whom was *D. B. Booth*, for the defendant.

We contend that, under the act in question, the taking of the land was not complete, and the title to it did not pass, until the money was either paid or deposited in accordance with the act; and until that event the borough had the

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right to abandon the project. The rule on this subject varies in different jurisdictions. In England, it is conceded that when a corporation has elected to take land and has given notice to the owner to treat or submit to arbitration, such owner can compel payment of the award. *The King v. Commissioners, &c.*, 4 B. & Adol., 335, note; *The King v. Hungerford Market Co.*, id., 327; *Stone v. Commercial Railway Co.*, 4 Mylne & Craig, 122; *Tawney v. Lynn & Ely Railway Co.*, 16 L. Jour. (N. S.) Eq., 282; *Walker v. Eastern Counties Railway Co.*, 6 Hare, 594; Hodge's Law of Railways, 170, 174; *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Iowa, 523-8; *No. Misso. R. R. Co. v. Lackland*, 25 Mo., 515, 528; *Stacey v. Vt. Cent. R. R. Co.*, 27 Verm., 39, 47. In some jurisdictions the final fixing of the location is conclusive. *Shaw v. City of Charlestown*, 3 Allen, 538; *Pinkerton v. Boston & Albany R. R. Co.*, 109 Mass., 527; *Old Colony R. R. Co. v. Miller*, 125 id., 1; *Clough v. Town of Unity*, 18 N. Hamp., 75; *Smart v. Portsmouth & Concord R. R. Co.*, 20 id., 233; *Morris & Essex R. R. Co. v. Blair*, 1 Stock., 635. In others, the final determination of the damages is controlling. *Neal v. Pittsburgh & Connellsville R. R. Co.*, 31 Penn. St., 19; *City of Philadelphia v. Dyer*, 41 id., 463; *Beale v. Pennsylvania R. R. Co.*, 86 id., 509; *Hudson River R. R. Co. v. Outwater*, 3 Sandf., 689; *In re Military Parade Ground*, 60 N. York, 319; *In re Rhinebeck & Conn. R. R. Co.*, 67 id., 242; *People v. Syracuse Common Council*, 78 id., 56; *Dayton & Western R. R. Co. v. Marshall*, 11 Ohio St., 497. The only other rule of which we are aware, that is, the one which we say is controlling in this case, is that the corporation can withdraw and abandon its proceedings at any time before payment of the damages. *Stacey v. Vermont Cent. R. R. Co.*, 27 Verm., 39; *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How., 395; *Garrison v. City of N. York*, 21 Wall., 204; *Graff v. Mayor &c. of Baltimore*, 10 Md., 544; *State v. Graves*, 19 id., 351; *Mayor &c. of Baltimore v. Musgrave*, 48 id., 272; *St. Louis & S. Eastern R. R. Co. v. Teters*, 68 Ill., 144; *City of Chicago v. Barbican*, 80 id., 482; *State v. Cin. & Ind.*

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R. R. Co., 17 Ohio St., 103; *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Iowa, 523; *No. Misso. R. R. Co. v. Lackland*, 25 Mo., 515; *State v. Hugg*, 44 id., 116; *Leisse v. St. Louis & Iron Mt. R. R. Co.*, 2 Mo. App., 105; *Rogers v. St. Charles*, 3 id., 45; *In re Washington Park Comrs.*, 56 N. York, 144; *Hooker v. N. Haven & Northampton Co.*, 14 Conn., 155; *Hawley v. Harrall*, 19 id., 151; *Carson v. City of Hartford*, 48 id., 68; 2 Dillon Munic. Corp., §§ 474, 475; Field on Corp., § 448 and notes. Unless there is some special statutory enactment to that effect, (as there is not in this case,) the payment of the value of the land cannot be compelled, until the title vests in the corporation. *Burroughs v. Housatonic R. R. Co.*, 15 Conn., 182. The change of the title is the correlative of the right to receive pay. *Stacey v. Vermont Cent. R. R. Co.*, 27 Verm., 39; *Thompson v. Grand Gulf R. R. Co.*, 3 How. (Miss.) 240; *Bona-parte v. Cam. & Amboy R. R. Co.*, 1 Baldwin C. C. R., 205; *Stewart v. Raymond R. R. Co.*, 7 Sm. & Marsh., 568; Field on Corp., § 448, note 1. This act does not state when, that is, at what stage of the proceedings the title shall vest in the borough, but by our decisions that title cannot vest until the deposit or payment of the damages. *Hawley v. Harrall*, 19 Conn., 151; Field on Corp., § 448, and note 1. The language of the act, (sec. 4,) "and the payment or deposit of (the damages) with the county treasurer, to the use of such owner or owners, shall release said borough from liability to any further claim for compensation or damages," clearly indicates that such payment or deposit is optional with the defendant, and for its benefit; certain it is that no claim can be made that the title passed to the defendant before such action. *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How., 399; *Norris v. Mayor &c. of Baltimore*, 44 Md., 598. There being no physical occupation of the land or dispossession of the owners, and no payment of damages, there has been no "taking" by the defendant. Sedgwick on Statutory Law, 2d ed., p. 454, note (a), and authorities cited.

GRANGER, J. By a resolution of the General Assembly passed in 1860 and added to in 1862, the borough of Danbury was empowered to supply itself with water by purchasing, or by taking for the purpose, any stream of water, water privileges or lands necessary or convenient for the purpose, within or without the limits of the borough; with a provision for the assessment of the value of any property taken otherwise than by purchase and for payment to the owner of the property so taken.

Under this resolution the borough, at a legal meeting held on the 16th day of July, 1880, voted to procure a supply of water for the use of the borough "from a stream running near the residence of Samuel Gregory." On the 26th of September of that year the borough purchased of Gregory certain lands through which the stream ran, and which were below certain lands and a water privilege on the same stream belonging to the plaintiffs. The lands were purchased of Gregory with the intention of constructing a dam thereon across the stream, making a pond or reservoir, which would have set the water back upon and have destroyed the mill privilege of the plaintiffs.

Under the resolution before mentioned the water commissioners of the borough, not being able to agree with the plaintiffs as to the compensation to be made them for the taking of their mill privilege and lands, applied to a judge of the Superior Court for the appointment of appraisers to assess the damage. Appraisers were appointed and a hearing was had before them, both parties being present, and they made their report, assessing the damages at \$3,000. This report was duly recorded in the records of the Superior Court for Fairfield County, and the proceedings were in all respects according to the provisions of the resolution in such a case.

On the 29th of June, 1881, the borough, at a legal meeting, voted to rescind the vote of July 16th, 1880, and nothing further was done with regard to the taking of the plaintiffs' land and privilege, and the \$3,000 assessed as damages for the taking was not paid. Notice of this action

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of the borough was given to the plaintiffs and they afterwards sold to other parties and conveyed by warranty two parcels of the land which the borough had proposed to take. The plaintiffs now sue the borough to recover the \$3,000 assessed in their favor.

It is found that the defendants never took actual possession of the lands in question or of the mill privilege, or in any manner occupied them or interfered with their occupancy by the plaintiffs. Had they in theory taken possession or by what they did become the owners of the property, so that they were bound to pay the assessed value to the plaintiffs?

The resolution of the General Assembly empowers the water commissioners of the borough to "purchase, and take conveyances in the name of the borough, of all lands, property or privileges necessary or convenient for the purposes of the act; to hold in sufficient quantity the water of any stream, either within or without said borough, by the construction of dams across the same; to enter upon any lands near such proposed dams and procure earth, stones or other materials for the construction and maintenance thereof, and to make suitable waste-ways for the surplus water of such stream; to change the location of any road or pass-way which may be covered by the waters of any reservoir so formed, and take land therefor; and to enter upon and make use of the ground or soil of any railroad, street, highway or private way, or public or private grounds, and lay, construct and maintain all necessary pipes and aqueducts."

Another section of the resolution provides as follows:—"Said borough shall be liable to pay all the damages that shall be sustained by any person, persons or corporation by the taking of any land or estate as aforesaid, or by the construction or laying of any reservoirs, pipes, aqueducts, or other works for the purposes of this act. And if at any time it shall appear that any damage has occurred or may be likely to occur to any person, persons or corporation by reason of taking or using their land or estate for the pur-

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poses of this act or in the construction of said water-works, and the said board of commissioners cannot agree with the owners of such property as to the amount of compensation or damages to be paid to them, then such compensation or damages may be assessed by three disinterested persons under oath, to be appointed by a judge of the Superior Court on application of either party; notice to be given of such application as directed by such judge. * * * Which said appraisers shall report their doings, embracing the amount of their assessment, to the clerk of the Superior Court for Fairfield County, to be by him recorded; and thereupon such assessment shall be taken and held to be a final adjustment of said compensation and damages between said parties, and payment thereof or deposit of the same with the county treasurer to the use of such owner or owners shall release said borough from liability to any further claim for compensation or damages."

There is here, it will be seen, no provision that the amount assessed shall constitute a debt which may be recovered of the borough by the owner of the property proposed to be taken; the amount is fixed by the proceedings as the sum to be paid if the land is taken, and its payment is clearly a condition precedent of the right to take it. The mere incipient or theoretical taking is really only a *proposed* taking. This is manifest from the use of the word "take" in the resolution in relation to lands taken for the laying of pipes, where the proposed taking, upon which the proceedings for the assessment are had, is a very different thing from the actual entry upon and digging up of the land for the laying of the pipes.

We conclude therefore that the borough, after the assessment, had still the right to abandon the idea of taking the land, and the whole project if it deemed best, and that the only security that the owner of the property had, was in the necessity of the borough making payment before the land was actually taken.

There may be a hardship in compelling a land or mill-site owner to hold his property in entire uncertainty, after an

assessment, whether it will be taken or not; but the inconvenience is of the same kind which attends all proceedings for the taking of land for public improvements, and which is incident to the ownership of property in a community and especially in a city. This inconvenience was shown in a marked degree in the recent case of *Carson v. City of Hartford*, 48 Conn., 68, where it was held by the court to give no right of action against the defendant city. There is generally a provision in such resolutions that the payment shall be made, if at all, within a limited time; and there ought properly to be such a provision in every case. But its absence here cannot affect the question now before us.

The plaintiffs claimed also to recover for counsel fees and other expenses incurred in the hearing before the appraisers. These very clearly they had no right to recover in any circumstances. The borough was acting within the law in applying for an assessment of the damages, and the law under which the proceedings were had made no provision for costs on either side, while the abandonment of the taking of the property by the borough could not create an obligation to pay these costs where no legal obligation existed before. There was no negligence on the part of the borough; no misrepresentation; no action that was not in every respect according to law. There was nothing upon which to found a claim for damages for a consequential injury in any form.

The Superior Court is advised to render judgment for the defendants on both counts of the complaint.

In this opinion the other judges concurred.

SUPREME COURT OF ERRORS,

HELD AT HARTFORD, FOR THE COUNTIES OF
HARTFORD, WINDHAM, LITCHFIELD,
MIDDLESEX AND TOLLAND,

ON THE FIRST TUESDAY OF MAY, 1885.

Present,

PARK, C. J., CARPENTER, LOOMIS, AND GRANGER. Js.*

LUCY M. HEWITT'S APPEAL FROM PROBATE.

A court of probate has no power to administer equities in making its decrees, except where they are directly involved in the matter upon which it is acting.

Where a woman who had a right of dower in lands of her deceased husband, had allowed the lands to be sold at auction as free from the incumbrance of dower, and had so stated to the purchaser, who paid the full price for the lands as free from dower, it was held that, upon her application made afterwards to the probate court to set out her dower, that court had no right to consider the question whether she was estopped from claiming dower by reason of the representations.

The equity here was wholly between the widow and the purchaser, who was a stranger to the estate, and did not grow out of the relation of the widow to the estate.

A setting out of dower conveys no title. The right to dower already exists and rests upon the whole real estate. The assignment of it merely designates a particular portion to which it shall be confined.

The Superior Court in a probate case brought before it by appeal, can exercise no equity powers that the probate court could not have exercised.

[Argued May 6th—decided August 28th, 1885.]

* Judge BEARDSLEY of the Superior Court, sat in the place of Judge PARDEE, (absent by reason of illness,) in this and two cases following it. Judge ANDREWS of the Superior Court sat in the cases of *Pease v. Cole* and *Newell v. Smith*, and in the remaining case of *State ex rel. Coogan v. Barbour*, only the judges of the Supreme Court sat.

Hewitt's Appeal from Probate.

APPEAL from a decree of a probate court refusing to assign dower to the appellant, as widow of Chauncey Welles, deceased, in the real estate of the decedent; brought to the Superior Court in Hartford County.

The reasons of appeal alleged that the appellant, now wife of George W. Hewitt, who was joined in the appeal, was the wife of the said Chauncey Welles at the time of his death on the 2d of February, 1869; that she was living with him at the time of his death; that no provision had been made for her by way of jointure or of settlement in lieu of dower before her marriage to him; that he died intestate, and was owner at the time and possessed in his own right of real estate in the town of Wethersfield, in this state, where he resided, (describing it); that she had never released or conveyed away her right of dower, and was now fully entitled to dower; that dower had never been assigned to her, and that the probate court for the district of Hartford, in which said estate was in settlement, had refused, upon her application for an assignment of dower, to set out the same to her, and that she was aggrieved by such denial.

The appellees, who had purchased, or acquired an interest in, the lands of the estate as free from the incumbrance of dower, filed the following answer:

That said Lucy M. Hewitt, and all persons claiming from or under her, are by her acts, words and conduct estopped in equity and also in law from claiming any dower interest in any of the real estate of which said Chauncey Welles died seized and possessed; and further that said Lucy M. Hewitt has, since the death of said Chauncey Welles, received from his estate large sums of money, to wit, the whole of the purchase money paid by the purchasers for all the real estate of which said Chauncey Welles died seized and possessed, excepting the sum of four thousand dollars; and that out of said purchase money said Lucy M. Hewitt received more than the equivalent in value of any and all dower interest in said estate, and accepted and received out of said estate the equivalent of

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such dower interest in money and other valuable things in lieu of all claim for dower against said estate.

To this answer the appellant demurred, assigning as cause that neither any or all of the allegations in said answer, if they were true, would be ground for the court of probate to deny to her the assignment of dower in said estate; and that the court of probate is a court of inferior, limited, and special jurisdiction, and no jurisdiction has been conferred upon it to try and determine titles to real estate, or to deny to the appellant her dower in said real estate for any cause alleged in said answer or claimed therein.

The court (*Carpenter, J.*) overruled the demurrer, and ordered the appellant to make further reply to the answer.

The appellant then filed a denial. The appellees filed a cross-complaint, praying for equitable relief, by a decree that the appellant and her husband execute quit claim deeds of the lands to the several appellees, and enjoining them from claiming dower for Mrs. Hewitt. The matters set up in this cross-complaint were the same that are stated hereinafter as the matters which the appellees offered to prove on the trial. This cross-complaint the appellant moved the court to strike out.

On the trial to the court the appellees offered evidence to prove that Samuel Woodhouse, guardian of the heirs of Chauncey Welles, obtained an order for the sale of the lands in which dower was claimed by the appellant as his widow; that the widow was present in court and concurred in the application for the order, and it (the application) was made at her request; that the court refused to grant the order unless the widow would relinquish her claim for dower; that the widow agreed so to do, and the order was thereupon granted; that the premises were sold to the appellees, the widow receiving a portion of the purchase money in payment of her right of dower; that the widow was present at the sale, and authorized and directed Woodhouse in her behalf to state, and he did so state, at the sale, that the purchasers would receive a title free from all

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claims, and that the land was sold free from her claim of dower, and that she would make no claim for it against purchasers or the land so purchased; and that relying on such representations, the appellees purchased and paid full value for the premises and a much larger price for the same than they otherwise would have paid.

To this evidence the appellants objected, and the court reserved the question whether the cross-complaint should be stricken out or the court should entertain it, and whether the evidence offered by the appellees was admissible or otherwise, also the sufficiency of the appellees' answer to the appellant's reasons of appeal, what decree should be passed, and all questions of law arising on the record, for the advice of this court.

H. S. Barbour and L. E. Stanton, for the appellant.

1. The appellant's right of dower was complete in her under the statute, and it was the duty of the probate court upon her application to cause it to be set out to her. This right exists as completely before the assignment is made as after. Immediately upon the death of the husband it is established in his widow, and she becomes a tenant in common with the heirs in her own right. This right "does not depend upon the assignment of dower, which is a mere severance of the common estate." *Stedman v. Fortune*, 5 Conn., 462; *Wooster v. Hunts Lyman Iron Co.*, 38 id., 256; *Greathead's Appeal from Probate*, 42 id., 374. The assignment of dower is a process of distribution of real estate. If the widow had a right of dower upon the decease of her husband, proceedings of distribution are to be had without reference to what may have occurred since. Even if she had deeded away her right, the distribution would be made in the same way as if she had not. *Griswold v. Bigelow*, 6 Conn., 266; *Holcomb v. Sherwood*, 29 id., 418; *Way v. Way*, 42 id., 52; *Greathead's Appeal from Probate*, *supra*.

2. This case comes to the Superior Court sitting for the trial of it as a court of probate; "for in all probate appeals

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the appellate court takes the place of the court of probate." *Davis's Appeal from Probate*, 89 Conn., 395, 401. See also *Strong v. Strong*, 8 Conn., 408.

3. Courts of probate are of limited, inferior and special jurisdiction, and have no powers but such as are conferred by statute. *Sears v. Terry*, 26 Conn., 273; *Parsons v. Lyman*, 32 id., 570; *First Nat. Bank v. Balcom*, 35 id., 357, 359. They cannot try titles to property, no such power being conferred upon them by statute. *Gold's Case*, Kirby, 100; *Parsons v. Lyman*, *supra*; *Homer's Appeal from Probate*, 85 Conn., 113. If then courts of probate cannot try titles to property, it follows that they cannot determine questions of estoppel; neither can the Superior Court do so while acting as a probate court, for in so doing it might affirm a decree of the probate court which that court had no power to make, and which it should not have made. *Treat's Appeal from Probate*, 85 Conn., 210; *Vail's Appeal from Probate*, 37 id., 195.

H. C. Robinson and *W. F. Henney*, for the appellees.

The evidence offered by the appellees is clearly admissible, because—1st. The facts therein stated would, if proved, constitute an estoppel in equity against the appellant's claim of dower. This position will not be disputed by the counsel for the appellant, and it can not be necessary to cite authorities in support of it.—2d. The court of probate may take cognizance of such an estoppel and enforce it, when proven, in bar of a motion for assignment of dower. *Holcomb v. Sherwood*, 29 Conn., 420. In support of this proposition, we urge the following considerations:—The statute (Gen. Statutes, p. 377, sec. 2,) provides "that the widow may apply to the court of probate before which his (her husband's) estate is in settlement, to have dower assigned to her; and it shall appoint three disinterested persons who, being duly sworn, shall set out such dower; and the doings of such persons being returned to and accepted by said court shall ascertain and establish such dower." Section 1 thus designates the persons entitled to

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dower:—"Every woman, living with her husband at the time of his death, etc., shall have right of dower." Section 4 prescribes the time within which the widow must give notice to the court of probate whether she accepts the provision made for her by the testator in lieu of dower, and adds:—"If she fail to give such notice she shall be barred of her dower." Section 5 provides that "any settlement of property in favor of a woman to take effect after the death of her intended husband, expressed to be in lieu of dower, shall be a bar to dower in his estate," unless the title shall fail in whole or in part, when she is to have dower sufficient to make up the deficiency. The court of probate must, therefore, ascertain before proceeding to assign dower:—

- (1) Whether the claimant is in fact the widow of the deceased.
- (2) Whether dower has been assigned to her.
- (3) Whether there is any provision in lieu of dower, and whether her claim is barred by her failure to give the notice prescribed by law of her refusal so to accept such provision.
- (4) Whether there has been any settlement of property in her favor which would be a bar to dower in her husband's estate, and whether the title to such property has failed in whole or in part.

Clearly on finding any of these statutory objections to exist, the court of probate could refuse to assign dower, and it would be its duty so to do. It has power therefore to determine, and is charged with the duty of ascertaining, whether the individual applying to have dower assigned to her is entitled to dower out of the estate in settlement before the court. This power is not exhausted, nor is this duty discharged, until the court has satisfied itself that there is no objection, equitable or legal, to the assignment of dower. For, having once acquired jurisdiction to determine the right of the party to such an assignment, it becomes, as to that matter, vested with the amplest chancery powers to do full justice between all the parties before it.

This conclusion is abundantly sustained by numerous well-considered decisions of this learned court. In *Bailey v. Strong*, 8 Conn., 281, the court say: "The settlement,

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and the entire settlement, of estates appertains to the several courts of probate; and from their decision an appeal lies to the Superior Court. These courts are vested with chancery powers on all subjects within their jurisdiction, and can so mould and form their decrees as to do entire justice between all parties in interest." And so in *Mix's Appeal from Probate*, 35 Conn., 123:—"Courts of probate, as to all matters within their jurisdiction, are clothed with chancery powers so far as may be necessary to enable them to do full justice between the parties." In *Beach v. Norton*, 9 Conn., 198:—"These courts have all the powers of a court of chancery, and in some respects much greater, in relation to the trial of questions within their jurisdiction." In *Ashmead's Appeal from Probate*, 27 Conn., 248:—"A court of probate possesses higher powers than a court of equity in the settlement of estates, for it is clothed with both legal and equitable authority for that purpose, and the current of our decisions has for many years tended strongly against allowing courts of equity to interfere in the settlement of estates. It is the often-expressed determination of our wisest and most experienced judges that the settlement of estates, whether in the hands of guardians, executors and administrators, trustees, assignees, or others who receive their appointment from the court, should be confined to that court. Such business can be there done more conveniently, expeditiously, and with less expense than in any other court, and at the same time with equal safety to all parties, since an appeal lies from that court to the Superior Court." And again at page 250 of the same opinion:—"All of us are satisfied that there is a clear and undoubted equity in favor of the appellees, and that the court of probate is competent, and the appropriate court, to administer that equity." In *American Bible Society v. Wetmore*, 17 Conn., 187:—"Our courts of probate, and Superior Courts acting on appeals from probate, recognize the principles of equity jurisprudence so far as they are necessary to protect and secure the rights of persons interested, and prevent the necessity of a direct resort to a court

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of *chancery*. The principles, therefore, which ought to govern a court of equity should have been the rule of the court of probate when acting on *this distribution*." In *Vail's Appeal from Probate*, 37 Conn., 195:—"The judge of the court of probate is not a chancellor. He possesses chancery powers, but they are only such as are incidental, connected with the settlement of a particular estate, and necessary for the adjustment of equitable rights." *Lawrence's Appeal from Probate*, 49 Conn., 419, would seem to be a case which completely controls the present inquiry. The refusal of the court to assign dower to the widow in that case is evidently quite as broad an exercise of judicial and chancery power as the act of the court of probate in the present suit. So also *Evans's Appeal from Probate*, 51 Conn., 438, would seem to be decisive of this very question. See also *Husted's Appeal from Probate*, 34 Conn., 495; *Way v. Way*, 42 id., 52; *Greathead's Appeal from Probate*, id., 376.

The very point under discussion has been decided by Chancellor RIDGELEY under a statute similar to our own, in *Farrow v. Farrow*, 1 Del. Ch., 457. The syllabus of the case has the following significant clause, the first part of which, it will be observed, is the identical expression made use of by this court in speaking of our courts of probate:—"The Orphans' Court is a court of equity as to all matters within its jurisdiction, and it may take cognizance of any bar to dower, equitable or legal." In delivering his opinion the chancellor says (page 460):—"As to the jurisdiction of the court there can be no question. The act respecting devises of land, joint estate and dower has enacted that 'in all cases where a widow may be entitled to dower the same may be assigned to her by the Orphans' Court of the county where the land lies, upon her petition to said court, by the like proceedings and in the same manner as is by law provided in the case of intestate estates.' There could be nothing clearer than the meaning of the legislature as expressed in this act. Authority is given in all cases where a widow is entitled, to assign her dower."

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And again in the same opinion, at page 462:—"The question is whether the plea of an equitable bar should be received by this court, supposing it to be available in equity." On this question the chancellor says (page 462): "This court, then, is a court of equity as to all matters within its jurisdiction, and whatever is a bar in law or equity may be pleaded. The act declares that in all cases where the widow may be entitled to dower, the same may be assigned by this court. If she is not entitled, or if there is any equitable bar, the court cannot assign it. The act seems to mean that the whole inquiry should be made by this court to ascertain that she has title before the dower can be assigned."

There is also the further argument, and it appears to us a strong one, that reasoning from analogy the court of probate having power to *assign* dower, would also have power to refuse to do so; for in *Peck v. Sturges*, 11 Conn., 422, it is held that from authority to reject given by statute it follows inevitably that the right to accept is also given the probate court.

The Superior Court, on an appeal, can now find and enforce such an equitable estoppel, even if the court of probate cannot. The following considerations would seem to fully sustain this proposition. The Practice Act, § 6, provides that "all courts which are vested with jurisdiction both at law and in equity, may hereafter, to the full extent of their respective jurisdictions, administer legal and equitable rights, and apply legal and equitable remedies, in favor of either party, in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action." An appeal from probate is an action. *Stiles's Appeal from Probate*, 41 Conn., 330. Hence, whatever may have been the jurisdiction of the Superior Court in appeals from probate before the passage of the Practice Act, that act has enabled such court to entertain and adjust equitable claims growing out of the subject matter of the appeal. And this, not as enlarging necessarily the Superior Court's jurisdiction, but as altering

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the manner and method of its exercise. It is simply rendering courts of justice more easy of access by broadening the avenues through which they may be approached. They are the same institutions as before, with the same jurisdiction, but exercising that jurisdiction at the instance of processes formerly unrecognized. An appeal is taken from a justice of the peace. Formerly only matter of legal defense could be pleaded. If there were any equitable defenses a separate action must be brought addressing the equity side of the court, and the two suits were kept separate and distinct. Now, in the appellate court, equitable defenses may be pleaded and the court may take cognizance of them in the same action. Here is no change of jurisdiction. The Superior Court always had an equitable jurisdiction, but could not, until the passage of the act, exercise it on an appeal from a justice court. Now it can exercise this jurisdiction on such appeal. This much in answer to the suggestion that it was not the design of the Practice Act to enlarge the jurisdiction of the Superior Court. The design of that act manifestly was to consolidate actions, so that the Superior Court, sitting in whatever capacity, could administer both legal and equitable relief so soon as it should get its legal grip upon the subject matter of the action brought before it, whether by appeal or otherwise.

PARK, C. J. Lucy M. Hewitt was the wife of one Welles, and was living with him as such at the time of his death. He died seised and possessed of real estate in his own right. No provision, by way of jointure, for the support of his wife had been made by him before their marriage, nor any settlement in lieu of dower had been made in contemplation of marriage. These facts are undisputed in the case.

In these circumstances the appellant brought her application to the probate court for the district of Hartford to have dower assigned and set out to her in the real estate of her late husband. The probate court refused the application, and an appeal was taken to the Superior Court.

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In that court the appellees filed a cross-complaint by way of counter-claim and equitable relief, setting forth such facts as would, in a court of chancery, having independent equity powers, estop Mrs. Hewitt from claiming dower in her late husband's estate. And they likewise offered to prove the same facts for the same purpose on the trial of the case. The appellant moved the court to strike the cross-complaint from the record; and further objected to the appellees proving the facts claimed for the purposes stated. The court reserved the questions for the advice of this court.

The principal facts stated in the appellees' cross-complaint, and which they offered to prove, are the following: That an application was made to the probate court for an order for the sale of the lands in which the appellant claims the right of dower, and made at the request of Mrs. Hewitt, the appellant; that the court refused to grant the order unless she would relinquish her claim for dower; that she agreed so to do, and the order was thereupon granted; that the lands were sold to the appellees, Mrs. Hewitt receiving a portion of the purchase money in payment for her right of dower; that she was present at the sale, and authorized and directed the auctioneer to state before the sale in her behalf that the purchasers would receive a title free from all claim of dower on her part; that the same statement was made to the appellees before the sale; and that relying on these representations the appellees purchased the lands, paying full value for them, and paying a much larger price than they otherwise would have done.

These are the principal facts of the case, and the question is, whether a court of probate, in the settlement of an estate, is vested with such equity powers that it can apply an estoppel in a controversy between the widow, on the one part, regarding her right of dower in her deceased husband's estate, and strangers to the estate on the other, having no interest whatever in it except as purchasers of land belonging to it.

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It is certainly true in this case, that, if the Superior Court can entertain the cross-complaint filed in that court, and grant the prayer thereof, the same could have been ~~done~~ by the probate court, when the cause was before that court, if a similar cross-complaint had there been filed; for the Superior Court takes the case as it stood before the probate court, and simply determines whether or not that court erred in its decision. The cases of *Davis's Appeal from Probate*, 39 Conn., 395, and *Strong v. Strong*, 8 Conn., 408, and many other cases that might be cited, fully establish the doctrine that the Superior Court sitting for the trial of a case like this, takes the place of the probate court from which it came, and can do no more than could have been done by that court.

But it is claimed that the Practice Act authorizes the Superior Court to entertain jurisdiction of the cross-complaint in this case. But the section of that act relied upon simply allows courts, that have law and equity powers to administer both in the same case. This court in *Harrall v. Levery*, 50 Conn., 46, says that "it was not the intention of the Practice Act to give any wider range to equitable defences and cross-suits than was before allowed by the settled chancery practice."

The other sections of the Practice Act referred to clearly do not apply to appeals from probate courts.

It is further said by the appellees, that courts of probate have equity powers to be administered in all cases where equitable considerations affect the matter with which they are dealing; that if application is made for the assignment of dower, the court must be first satisfied that the applicant possesses the statutory requisites without which no right of dower exists; and that this power of inquiry is not exhausted, nor is this duty discharged, until the court has satisfied itself that there is no objection, equitable or legal, to the assignment of dower; for having once acquired jurisdiction to determine the right of the party to such assignment, it becomes, as to that matter, vested with the

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amplest chancery powers to do full justice between all the parties before it.

No doubt courts of probate should be reasonably satisfied that an applicant for the assignment of dower possesses the statutory requisites before it becomes its duty to make the assignment. But the assignment of dower does not establish the title in the applicant to dower in the lands assigned, any more than the setting off of lands on an execution establishes the title to the lands in the execution creditor. All that is done in either case is, simply to designate the lands in which dower exists in one case, if it exists at all, and to satisfy the debt in the other if title by the levy is acquired, which depends upon the execution debtor being the owner of the lands set off. If the title in either case is disputed, further proceedings before another court would be necessary to determine it.

No question is made in this case but that Mrs. Hewitt was once entitled to dower in the lands of her late husband. Suppose, while she was thus entitled, dower had been assigned and set out to her, and afterwards the transactions claimed to have occurred in this case had taken place. Could any proceeding be brought by the appellees to the probate court to set aside or destroy her right of dower? And if not, how can it be done here? A widow's right to dower exists and is as perfect before dower is assigned to her as afterwards, the only difference being, that before the assignment it is attached to all the land, and afterwards to a particular portion of it. The effort here is to set aside by the probate court Mrs. Hewitt's right to dower which once existed, which would be doing the same thing in effect as in the case supposed.

Again, suppose, instead of the transactions which are claimed to have occurred in this case, the claim was that Mrs. Hewitt had deeded her right of dower to the appellees, and that therefore dower should not be assigned to her. Suppose she should claim in that case that what purported to be a deed was obtained from her by fraud, or duress, or was executed by mistake, in the belief that she was exe-

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cuting one instrument when, in fact, she was executing another. Must a probate court determine all these questions before the lands can be designated in which she has dower, if she has it at all? If this is so the court of probate would be assuming the right to determine her title to dower. But *Gold's Case*, Kirby, 100, and *Homer's Appeal from Probate*, 35 Conn., 113, hold that that court can not settle matters of title.

But the appellees insist that the probate court can try and determine the equitable title of Mrs. Hewitt to dower, as it exists between her and third parties, and should do so before the court assigns her dower, on the ground that such courts administer equity in some cases, and that this is one of the cases where it has this power. But the equity which a court of probate can administer must grow out of, and be inseparably connected with, the matter the court is acting upon. The court was called upon to assign and set out dower to Mrs. Hewitt. It is admitted she had the statutory requisites. Setting out dower does not affect in the least her title to dower in the lands designated. If she has done things which in equity estop her from claiming dower, the equity does not grow out of, nor is it connected with, the matter that the court has in hand, the mere designating of the lands in which she is to hold her dower. It grew out of a purchase of the dower lands after her dower had attached. The case of *Selleck v. Selleck*, which appears in a note to *Andrews v. Andrews*, 8 Conn., 86, is decisive of this question.

Again, courts of probate in the settlement of estates order a distribution of them. They distribute them among the persons originally interested in them. If an heir sells his interest in the estate before distribution, distribution is made to him in the same way as if no sale had been made. If a widow sells her right of dower before it is assigned to her, it is set out to her notwithstanding. Setting out dower is an act pertaining to the distribution of the estate. The appellees are outside parties. They have no interest in the estate except as purchasers. They bring this controversy

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before the court and object to the setting out of dower to the widow on the ground solely of equity pertaining to them in their purchase. Such equity does not grow out of the distribution of the estate, neither does it arise between the persons originally entitled to it, but grows out of a purchase by strangers to the estate. Such an equity cannot be administered by the probate court.

We advise the Superior Court to dismiss the cross-complaint; that the evidence offered by the appellees is inadmissible; that the answer is insufficient; and to reverse the decree of the court of probate.

In this opinion the other judges concurred; except GRANGER, J., who dissented.

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SILAS G. PATTERSON AND ANOTHER, ADMINISTRATORS,
vs. FREDERICK KELLOGG AND ANOTHER.

Where *A* has a claim to an account of income from certain property against *B* down to a certain date, and from that date against *C*, the grantee of *B*, he can not join *B* and *C* as co-defendants in the same suit. The liability of *B* to account not extending beyond his sale of the property to *C*, there could be no joint liability.

This could not have been done before the passage of the Practice Act, and nothing in that act authorizes it.

The report of a committee in a suit for an account ought not to be rejected or set aside if it presents all the facts required to enable the court to settle on an equitable basis the accounts between the parties.

[Argued May 5th—decided June 26th, 1885.]

ACTION for an account and for equitable relief; brought to the Superior Court in Litchfield County. Facts found by a committee and judgment rendered (*Andrews, J.*) in favor of one of the defendants upon a counter-claim asking for a foreclosure and dismissing the complaint as to the other defendant. The plaintiffs appealed. The points

decided by the court will be sufficiently understood from the statement of the facts in the opinion.

W. F. Taylor, for the appellants.

A. H. Fenn and *D. T. Warner*, for the appellees.

CARPENTER, J. Pierce, the plaintiffs' intestate, and the defendant Kellogg, were the joint owners of a wood lot and a saw mill standing thereon, and carried on the wood and lumber business as partners for more than thirty years. In 1872 the mill became old and the machinery worn, and a new mill was built with new machinery. Kellogg advanced most of the money for that purpose, and Pierce gave him a note for his share, secured by a mortgage of his interest in the real estate. In 1875 that mill burned down and another one was built in its place, Kellogg advancing the money as before, taking another note and mortgage from Pierce.

Pierce died August 6th, 1881. Kellogg continued the business until February 8th, 1882, when he sold his half of the real estate to the defendant Calhoun, and assigned to him the two notes and mortgages. On the 2d of August, 1882, this suit was brought, alleging, among other things, that the notes were without consideration, that they had been paid, that Kellogg had had the management of the partnership business, taking the avails thereof; that he had in his possession a large quantity of timber, lumber and other personal property belonging to the partnership; that after the death of Pierce he continued the business without the consent and against the objection of the plaintiffs; that he and Calhoun carried it on jointly after February 8th, 1882, and that the defendants had refused to account for the same.

The complaint prays for an account, for a re-conveyance if the notes shall be found to have been without consideration or to have been fully paid, and for the privilege to redeem if the notes were for a good consideration and not paid.

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An accounting was had between Pierce and Kellogg before a committee, the notes were found to be for a good consideration, and an unpaid balance due thereon. The court rendered a judgment on the counter-claim of the defendant Kellogg, foreclosing the equity of redemption unless the plaintiffs should redeem within the time limited.

The defendant Calhoun made answer that on the 4th day of August, 1882, he re-assigned the notes and mortgages to Kellogg and delivered to him the possession of the mortgaged premises, and that now he had no interest in the causes of action mentioned in the complaint. To that answer there was a demurrer. Without any judgment on the demurrer the complaint was dismissed as to him without costs. The plaintiffs appealed.

The first question arises under the remonstrance. It is somewhat vaguely stated, and the reasons of appeal do not show clearly the question which the plaintiffs made. But by the aid of the brief we conclude that the question is this—that the committee should have held the defendant Kellogg responsible for the income and profits of the business after he sold to Calhoun to the date of his report, and should have stated the account accordingly; and not having done so, that the court erred in accepting the report; that is to say, the court should have rejected the report. We do not think that this exception is well taken, because the report of the committee shows that, after the conveyance to Calhoun, he alone operated the saw-mill, (not that he continued the partnership business,) and that the net receipts therefrom to August 6th, 1882, were \$53.80. Perhaps the plaintiffs would have been entitled to have one half of that sum applied on the mortgage notes if they had made that claim. If so, the presumption is that the court would have applied it. But instead of claiming that, they asked that the report be set aside or re-committed, thus involving another trial before the committee. Such a proceeding we think was unnecessary, as the court had before it all the material facts and could have settled upon an

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equitable basis the accounts between the parties down to the commencement of the suit.

But the objection involves this further claim, that Kellogg is chargeable with the rents and income from the mortgaged premises from the commencement of the suit down to the date of the report. He is doubtless chargeable for all that he received during that time. But the case shows that Kellogg sold his half of the joint property in February, 1882, and that since that time Calhoun has been in the possession of it. The report expressly states that "after the conveyance by Kellogg to Calhoun, on the 8th day of February, 1882, of his interest in the mill property and woodland, Kellogg had nothing to do with the property so conveyed, *nor with the interest of the estate of Pierce in the same.*" Nor can Kellogg be chargeable on account of the occupancy by Calhoun, because, after the re-conveyance Calhoun held possession of the saw-mill, not as mortgagee, or under the mortgage, but as tenant in common. And also for the further reason, as the report states, that "no account was rendered to the committee of the receipts and expenditures by Calhoun in running the mill since August 6th, 1882." And it does not appear that either party claimed that any such account should be taken. The committee did not err in not doing what neither party claimed that he should do.

The next question is whether the court erred in dismissing the complaint against Calhoun. The plaintiffs complain that no account was taken of the profits received, either by Kellogg or Calhoun, after the sale to Calhoun. We have already sufficiently considered this claim so far as it concerns Kellogg. So far as it concerns Calhoun it requires further notice.

On the face of the complaint Calhoun was properly made a defendant. He was the owner of the notes, and as such was interested in the relief sought by the plaintiffs. Moreover it is alleged that he in common with Kellogg received income and profits from the partnership property. Immediately after the suit was brought he re-assigned the notes and mortgages to Kellogg and had no further interest in

them; and the report of the committee shows that he received no part of the income in common with Kellogg; so that, as the case finally stood, the plaintiffs had a claim for an accounting by Kellogg of the partnership business down to February 8th, 1882, and after that date a claim against Calhoun for their share of the income from the common property. It will be noticed that the two claims are entirely separate and could not properly be joined in one action. The plaintiffs might with the same propriety have joined the defendants in one suit on several promissory notes held against them respectively. That could not have been done under the old practice, nor will it be permitted under the Practice Act. That act, section 12, provides that any person may be made a defendant who has or claims an interest in the controversy or any part thereof adverse to the plaintiff. In this case Calhoun had no interest in the controversy with Kellogg, nor had Kellogg any interest in the controversy with Calhoun. And so the plaintiffs practically regarded it; for they asked for no judgment on the demurrer, and none was in fact rendered. It is a fair inference from the record that they made no claim against Calhoun before the committee, and asked of the court no judgment against him on the report. Indeed, as the pleadings stood, his case was not before the committee at all. If the plaintiffs had desired to pursue their claim against him, the demurrer should have been first disposed of, and then, if the pleadings presented a proper case for a committee, the parties could have been heard before him.

There is no error in the judgment.

In this opinion the other judges concurred.

WILLIAM DONAGHUE AND ANOTHER *vs.* JOHN H. GAFFY.

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The defendant published of the plaintiffs, who were a firm of wholesale liquor dealers, the following:—"To the Liquor Dealers of Hartford: In order that you may be on your guard against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. I refer to Donaghue Brothers, consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them, but because I quit buying of them, they went to the savings bank, of whom I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease, served a notice on me to immediately vacate. The firm is not worthy of our support, being guilty of foul and unfair dealings to get square, as they say, with one who exercises the right to trade where he likes, and I sincerely believe they deserve that kind of warfare known as 'boycotting,' and request those who believe in the fair thing as between man and man, to give their support to some other house. For further particulars call on the undersigned. J. H. GAFFY." In an action for a libel in this publication, in which the damage alleged was to the joint business of the plaintiffs, it was held—

1. That evidence of the mental suffering of the individual plaintiffs was not admissible.
2. That if the libel could be construed as against the separate individuals of the firm, and the complaint had so charged, a joint suit could not have been maintained.
3. That the words were not actionable *per se*.
4. That the smallness of the damages recovered in the court below was not a reason for not granting a new trial to the defendant, because all the damages allowed by the jury appeared to have been for mental suffering, so that the trial resulted in a judgment wholly erroneous.

In a suit for a libel the truth of the matter published must be specially set up in the defense, if the defendant wishes to take advantage of it, either for justification or mitigation of damages.

And it makes no difference that the matter published is not a libel *per se*, so long as it shows on its face personal animosity equivalent to actual malice.

This has been the long established rule, and there is nothing in the Practice Act to change it.

The Practice Act, in both spirit and letter, requires that all formal and technical objections be made known as early as practicable, that the plaintiff may amend or proceed anew, and that the parties may, as expeditiously and inexpensively as possible, reach and settle the controversy on its merits.

While the omission to demur to defects appearing on the face of the pleadings may be regarded as a waiver of the objection, yet this court

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reserves the right, in cases brought before it for review, to consider questions not thus raised, if the objections are of such a character as to nullify the proceedings and render the judgment liable to be set aside on a writ of error.

[Argued May 6th—decided June 8th, 1885.]

ACTION for a libel; brought by the plaintiffs to the Superior Court in the county of Hartford.

The complaint alleged that the plaintiffs, on the 19th day of April, 1881, were engaged in the wholesale liquor business in the city of Hartford as a firm under the name of Donaghue Brothers, and that the defendant on that day caused to be printed the following circular, and distributed a large number of copies of it within the city of Hartford, and especially among the customers of the plaintiffs:

"To the Liquor Dealers of Hartford and vicinity:

"In order that you may be on your guard and protect yourselves against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. The concern I refer to is Donaghue Brothers, consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them for years, but because I quit buying of them, they went to the Middletown Savings Bank, of whom I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease of the premises, served a notice on me to immediately vacate. Considering the mean and unfair manner in which this firm have treated me, I have wondered to myself whose turn will come next, should anybody feel like exercising their right to buy of whom they like. I believe it is time to speak out and warn the trade against a firm who, because we buy of somebody else, subject ourselves to the same treatment I have received. The firm of Donaghue Brothers are not worthy of our support, being guilty of foul and unfair dealings to 'get square' as they say, with one who exercises that right that every honest man has who pays his bills to trade where he likes, and I sincerely believe they deserve that kind of warfare recently inaugurated in

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a little green isle across the sea, known as 'boycotting,' and request those who believe in the fair thing as between man and man, to give their support to some other house. For further particulars call on the undersigned.

"J. H. GAFFY."

The complaint then averred that the publication was false and malicious, that it was distributed for the purpose of injuring the plaintiffs' business, and that the effect had been and would be to cause customers to refuse to buy of the plaintiffs, whereby they had been and would be subjected to heavy pecuniary loss.

The case was tried to the jury, on a general denial, before *Sanford, J.*, and a verdict rendered for the plaintiffs for fifty dollars damages. After the verdict the defendant moved in arrest of judgment on the ground of the insufficiency of the complaint, which motion was overruled and judgment rendered on the verdict. The defendant appealed. On the appeal the court made the following finding.

On the trial the plaintiffs offered to show that by reason of the printing and publication of the libel, they suffered great mental pain and distress, and asked to be compensated therefor. To this evidence the defendant objected, on the ground that as the suit was a partnership suit, or a suit brought by the firm of Donaghue Brothers, such evidence was inadmissible, for the reason that a copartnership could not suffer mental pain or distress; and that the evidence was inadmissible for the further reason that there was no allegation in the complaint of such mental pain or distress, or claiming damage therefor. The plaintiffs' counsel, in answer to the first objection, stated that the suit was not brought as a copartnership, but as an individual suit, and as to the second objection, that it was not necessary that the complaint should allege and claim damage for mental suffering in order to recover therefor. The court overruled the several objections made to the evidence by the defendant, and allowed the same to be offered by the plaintiffs, to

which ruling the defendant took exception. The defendant under his plea of the general issue offered evidence to prove the truth of the alleged libel, which evidence was objected to by the plaintiffs and ruled out by the court; to which ruling the defendant duly excepted.

H. O'Flaherty and D. L. Aberdeen, for the appellant.

1. It is entirely clear from the complaint that the suit was brought as a partnership suit, and not as the suit of the individual plaintiffs. It is not merely alleged that the plaintiffs were partners under the name of Donaghue Brothers, but the alleged libel was clearly aimed at the firm, and the suit is brought to recover damage for the injury done to the business of the firm and for that alone.

2. A partnership as such can not be regarded as suffering mental distress, and certainly can not recover damages therefor. Townshend on Slander, (2d ed.,) 262, 298; *Titus v. Follet*, 2 Hill, 318; *Beardsley v. Tappan*, 1 Blatchf., 588.

3. The court erred in holding that the defendant under the general issue could not prove the truth of the alleged libel. Its falsity was averred by the plaintiffs and had to be proved as a part of their case, and the defendant had the right to show that it was not false.

4. The motion in arrest of judgment should have been granted. The complaint contains no allegation that the libel was published of and concerning the plaintiffs; and the suit is brought by them as two individuals while the supposed libel is clearly against the firm only, and the damages claimed are only those sustained by the firm.

C. E. Perkins and J. G. Calhoun, for the appellees.

1. The mental suffering here proved was a direct result of injury to the joint business. It was anxiety over business safety, originating when business interests were attacked, proportioned in intensity to business peril, ending when that peril had passed, and it would naturally have interfered with their prosecution of the joint business. And this distress did not need to be alleged. Mental dis-

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trespass, resulting from a tort of this kind, is included among those general damages which the law presumes, and which need not be specially pleaded. *Seger v. Barkhamsted*, 22 Conn., 298; *Swift v. Dickerman*, 31 id., 294; *Adams v. Smith*, 58 Ill., 417. A tort-feasor is responsible for all the immediate injury occasioned by his wrongful act. *Swift v. Dickerman*, *supra*. Mental suffering is undoubtedly one of the natural consequences of a tort of this kind, and the fact that a person is associated with a partner does not remove the anxiety occasioned by an attack on his business. The distress occasioned to individuals thus connected in business by a dangerous libel being therefore a wrong for which the tort-feasor can be held responsible, it remains to be seen how that suffering can be remedied.

2. The defendant claims that we can not recover in this joint action for this mental distress. His position here is that we have not brought suits enough against him; that the injury can only be satisfied by two additional actions, in which these plaintiffs shall sue separately. In each of these actions the plaintiff would have a right to demand satisfaction for loss actually suffered, for compensation for the expenses of suit and for vindictive damages. Such a multiplication of suits is to be avoided if possible, and for this reason, if for no other, the plaintiffs may recover in a joint action for mental distress suffered in consequence of a libel of their joint business. *Le Fanu v. Malcomson*, 1 H. L. Cases, 666; *Foster v. Lawson*, 3 Bing., 456; *Robinson v. Marchant*, 7 Queen's Bench, 926. If the plaintiffs are allowed to recover in this action it will be a bar to separate actions brought for the mental anxiety suffered by each. *Holcomb v. Phelps*, 16 Conn., 127.

3. If, however, the court shall be of the opinion that the court below should not have admitted evidence of mental suffering, yet a new trial should not be allowed because of a technical error in the ruling. The damages awarded are small, and not based solely or mainly on the mental suffering, nor does it appear that the jury increased the damages on that account, and to allow a new trial where the amount

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in question is trivial, and where the only gain that can possibly accrue to the defendant is a slight reduction in the damages, is only to gratify the same spirit that prompted the libel, and is against the uniform practice of this court. *Buddington v. Knowles*, 30 Conn., 26; *Burns v. Fredericks*, 37 id., 92; *Hull v. Bartlett*, 49 id., 66.

4. There can be no question as to the correctness of the ruling that the defendant could not, under the general issue, prove the truth of the libel. The defendant chose to rest his case on the general issue, and the case of *Swift v. Dickerman*, *supra*, leaves no doubt that the truth must be specially pleaded if the defendant wishes to take advantage of it. And it is immaterial that the complaint alleges the charge to be false and malicious. Such an allegation was superfluous, as the law implies malice from the publication of words that are libelous *per se*. *Dale v. Harris*, 109 Mass., 198; *Gassett v. Gilbert*, 6 Gray, 94; *Brow v. Hathaway*, 13 Allen, 239; *Zuckerman v. Sonnenschein*, 62 Ill., 115. Nor is a plaintiff permitted to prove the falsity of a charge, as his innocence is presumed. 2 Greenl. on Ev., § 419.

5. The court did not err in overruling the defendant's motion in arrest. The suit is brought jointly by the two plaintiffs and the libel was against them as two individuals, named separately, and the acts it charges are acts of individuals based upon dislike and revenge. And it was not necessary that there should be an allegation that the libel was published of or concerning the plaintiffs. The rule upon this point is clearly laid down in *Mix v. Woodward*, 12 Conn., 280, where the inquiry is stated to be "whether the plaintiff has stated such a case in his declaration that the conclusion that he was the person meant could properly be drawn by the jury." The complaint recites that the circular was distributed among the customers of the plaintiffs, that it was so distributed for the purpose of injuring their business, and that such has in reality been the effect of it, and also sets out the circular itself, in which they are separately named. This is a sufficient definiteness of description. In *Clement v. Fisher*, 7 Barn. & Cress., 459,

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there was no allegation that the libel was published of and concerning the plaintiff. Lord Tenterden says such an allegation "would have been unnecessary if there had been in the libel set out anything which clearly applied to the plaintiff, or any distinct innuendo so applying the libelous matter."

LOOMIS, J. In admitting evidence to show the mental pain and distress of each of the plaintiffs we think the court below erred.

The complaint is so drawn as to restrict the claim for damages to the injury to the joint business of the plaintiffs. The allegation is that "the plaintiffs are engaged in the liquor business in Hartford, under the name of Donaghue Brothers, and said circular" (referring to the alleged libel) "was so distributed among their customers for the purpose of injuring and destroying their business, and the effect of the same has been and will be to cause customers to decline and refuse to buy of the plaintiffs, whereby the plaintiffs have been and will be subjected to heavy pecuniary loss."

Again, the alleged libel upon which the complaint was founded was clearly directed against the firm rather than the individuals composing it. At the outset the circular proposes to state the defendant's experience with the firm of Donaghue Brothers, and the word "firm" or its equivalent is repeated five or six times, and the conclusion from the facts stated is very explicit—that "the firm of Donaghue Brothers are not worthy of our support." From these considerations the error in the ruling referred to will be sufficiently apparent without any citation of authorities. We will only add that it is well settled that in an action for libel by two or more partners, damages cannot be recovered for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business. *Folkard's Starkie on Slander and Libel*, (4th Eng. Ed., Wood's Notes,) Sec. 189; *Haythorn et al. v. Lawson*, 8 Car. & P., 196; *Tayler v. Church*, 9 Johns., 281.

Were the complaint for a distinct libel on the plaintiffs

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as individuals; it would still be objectionable, because it would make a joint claim of that which in its nature must be several. In England, under the new special rules that obtain there, it may perhaps be allowed, but not in this country. In *Kinkle v. Davenport*, 38 Iowa, 355, it was held that a joint action for slander cannot be maintained. If the same slanderous words be at the same time spoken respecting several persons, they furnish each a ground for a separate action, but they have no community of interest, and they cannot sue together.

But the plaintiffs claim that if the ruling is conceded to be erroneous a new trial ought not to be had because the damages awarded were small, and the only gain to the defendant resulting from a re-trial would be a slight reduction in the amount. And they cite in support of the principle *Buddington v. Knowles*, 30 Conn., 26, *Burns v. Fredericks*, 37 Conn., 92, and *Hull v. Bartlett*, 49 Conn., 66.

We do not think the principle of these decisions applicable to the case at bar, for the reason that all the damages allowed by the jury for mental suffering were improper, and the case does not disclose any other damage proved or even claimed. The mis-trial therefore, for aught we know, resulted in a judgment wholly erroneous.

But it may be suggested that nominal damages must have resulted from proof of the alleged libel, without any evidence of actual damage. This would follow if the words were actionable *per se*, otherwise special damage would have to be proved. Ought then the circular to be construed as containing a libel *per se*? We think not. All parts of the paper should be read in connection to collect the true meaning. If so read, the severe epithets applied to the plaintiffs lose all their force except as they attempt to characterize a single transaction, which is manifestly referred to as the sole foundation for all the statements made. That transaction, or "experience" as the circular calls it, clearly shows that the epithets—"base treachery" and "foul and unfair dealings," are not to have their ordinary meaning. The gist of the whole matter is thus stated by the defendant:—

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"I have been in the habit of buying nearly all my goods of them for years, but, because I quit buying of them, they went to the Middletown Savings Bank, of whom I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease of the premises, served a notice on me to immediately vacate." Now all this is a perfectly lawful transaction whatever the motive; and how can we legally presume from such a statement that the plaintiffs were thereby degraded in the estimation of acquaintances or the public, or that they suffered loss in character, property or business?

Leaving out the epithets which express the defendant's opinion as to the character of the transaction he relates, the analogy is perfect between this case and that of *Homer v. Englehardt*, 117 Mass., 539, where it was held that, to publish of a saloon keeper that "to get rid of a just claim in court he set up as a defense the existing prohibitory liquor law; we feel it our duty to make such conduct publicly known, in order to caution beer brewers and liquor dealers," was not libelous. And in *Bennett v. Williamson & Burns*, 4 Sandf., 60, it was held not libelous *per se* for the defendant to publish in a newspaper that "the plaintiff requested the holder of a note, of which he was the maker, to wait for payment after the same had matured; that the holder waited accordingly, and afterwards, the note being sued, the plaintiff pleaded the statute of limitations and got off scot free."

The defendant further claims that the court erred in holding that he could not, under the general issue, prove the truth of the alleged libel, inasmuch as it was alleged in the complaint to be false and malicious, making that an essential part of the plaintiffs' case and calling on them to prove it, and so allowing the defendant to disprove it under his general denial. This court has adhered inflexibly to the rule laid down in *Swift v. Dickerman*, 31 Conn., 295, and in other cases there referred to, that the truth must be specially pleaded if the defendant wishes to take advantage of it, either for justification or for the mitigation of the damages.

We discover nothing in the Practice Act which should change the rule. Upon principle however it would seem that if the matter charged is not libelous *per se*, so that the law would infer malice, and neither the libel itself nor the circumstances indicate any actual malice, the plaintiff might well be required to furnish evidence of the fact in order to recover, and the defendant be allowed to disprove it even by showing the truth under a general denial. In this case, although the circular may not be libelous *per se*, yet it carries on its face evidence of personal animosity equivalent to actual malice, so that we think the general rule that has hitherto obtained in this state applies and that the ruling referred to was correct.

The remaining question is, whether the court erred in overruling the motion in arrest for any of the special reasons assigned by the defendant; for we shall confine ourselves to these alone. A part of the reasons it is evident are inapplicable upon our construction of the complaint and the alleged libel, and the remaining reasons, if true, were cured by the verdict. This is all we need say, except to call attention again to the Practice Act, which in terms requires that "all defenses, other than those to the jurisdiction or in abatement, shall be made by an answer or by a demurrer," and that "all demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient." And the spirit of the Practice Act accords well with the letter, in that its design is manifest to have all formal and technical objections made known as early as practicable, so that the plaintiff may amend or proceed anew, and the parties may, as expeditiously and inexpensively as possible, reach and settle their controversy upon its merits. *Wall v. Toomey*, 52 Conn., 39; *Trowbridge v. True*, id., 107; *Merwin v. Richardson*, id., 233.

While we may regard the omission to demur to defects appearing on the face of the pleadings as a waiver of the objection, yet we reserve the right, in cases brought before this court for review, to consider questions not legitimately raised, if the objections are of such character as to nullify

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the proceedings and set aside the judgment on writ of error.

There was error in the judgment complained of, and a new trial is ordered.

In this opinion the other judges concurred.

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ERNEST M. PEASE vs. CHARLES H. COLE AND ANOTHER.

In the case of non-trading partnerships the individual partners have not the same implied authority as in commercial partnerships to bind the firm by notes executed in the name of the firm.

In such a case the presumption of want of authority may be overcome by proof of express authority or of such a state of facts as justly implies authority.

These facts may be a course of conduct on the part of the firm, the usage of similar partnerships, the necessities of the business, or a ratification of the act by receiving the benefit of it.

A partnership formed for conducting a theater is one of the non-trading class.

How far a bona fide holder of a promissory note thus executed is affected by the character of the partnership where he had no knowledge on the subject: *Quære*.

Whether the note of a non-trading partnership, made by one of the partners, for a debt of the firm, would not be binding on the firm: *Quære*.

The term "burden of proof" is properly used only with reference to a party who is burdened with the necessity of proving some affirmative fact essential to the support of his case. The burden of proof, in this sense, never shifts from side to side during the trial. The necessity of supplying prevailing evidence shifts from one side to the other as the evidence on one side or the other predominates; but this is a matter of sufficiency of proof, not of the burden of proof.

[Argued May 19th—decided August 28th, 1885.]

ACTION by an indorsee on a promissory note of the defendants; brought to the Court of Common Pleas of Hartford county and tried to the court before *Calhoun, J.* The following facts were found by the court:

In July, 1883, the defendants, Charles H. Cole and Daniel

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McCarthy, formed a copartnership for the purpose of conducting the Capital Theater in the city of Hartford. The copartnership was to continue four years. The partnership agreement was by parol. The defendants were equal partners. The defendants commenced business early in August, 1883, and afterwards, on the 24th day of August, 1883, the defendant McCarthy borrowed of his father, J. B. McCarthy, \$750, for which he gave the note in suit.

The weekly expenses of the theater were about \$350. For a time each partner paid bills as they were presented, but no amount of capital stock was agreed on, nor was any sum paid in as such by either of the partners. McCarthy advanced about \$666 in the payment of bills, and Cole about \$3,200.

McCarthy was an actor, and performed on the stage, and was worth in cash, when the copartnership was formed, about \$700 or \$800, and this was known to Cole. Cole had been a theatrical manager, and was a man of some means. He resided in Bridgeport, Connecticut.

Neither partner had any express authority to execute notes in the firm name, and the note in suit was the only one given in the firm name. Cole did not know that this note had been given until the plaintiff had purchased it, nor did he know that his partner had borrowed money of J. B. McCarthy. When this note was given the firm owed about \$900 for chairs. There was no evidence to show that the money borrowed by McCarthy was applied for copartnership purposes, nor in what way it was used by him.

The plaintiff bought this note of J. B. McCarthy, the father, for \$700, November 20th, 1883, and it was indorsed by said McCarthy to the plaintiff. About ten days before November 20th, 1883, J. B. McCarthy applied to the plaintiff for a loan on the note. This the plaintiff refused. Afterwards on the same day the plaintiff inquired of the defendant McCarthy if the note was good, telling him that his father wished to borrow money on it. McCarthy told the plaintiff that the note was all right and was a firm note.

Trusting to this statement the plaintiff bought the note of the payee as before stated.

After J. B. McCarthy applied for a loan on the note, and before November 20th, 1883, the plaintiff saw Cole, but made no inquiry of him respecting the note. This failure to inquire of Cole did not arise from a belief that such an inquiry would result in finding the note invalid, and the plaintiff had no express notice of any defect in the note. The plaintiff purchased the note in good faith, without notice of any defect therein.

The plaintiff knew that the note was in the handwriting of Daniel McCarthy, and of the relation between him and J. B. McCarthy, and the nature of the business carried on by Cole & McCarthy, and that Cole was the only one of the partners of any pecuniary responsibility. The plaintiff had occasionally loaned money to the firm to pay bills before November 20th, 1883, at the request of the defendants' manager. The largest sum so loaned was \$70. Except in one instance these loans were made by cashing Cole's checks.

Upon these facts the defendant Cole claimed as matter of law—(1) that the defendant McCarthy had no authority to execute the note in suit; (2) that the plaintiff was not a bonâ fide holder of the same, and that he had both express and implied notice that the note was a fraud on the defendant Cole.

The court overruled these claims and rendered judgment for the plaintiff against both of the defendants for the amount of the note. The defendant Cole appealed to this court.

G. G. Sill and *H. S. Sanford*, for the appellant, contended that the partnership in the present case belonged to the class known to the law as "non-trading partnerships," as distinguished from trading or commercial partnerships; that while in the latter class there is an implied authority in each partner to bind the firm by executing notes in the name of the firm, no such implied authority exists in the

case of the former class; that therefore McCarthy here had no such implied authority and could bind the firm by executing a note in its name only upon authority actually given or to be inferred from the practice of the firm, or upon the act being ratified by the firm by an acceptance of the benefit of it; that no such authority or ratification was proved here, it being expressly found that this note was the only one ever given in the firm name and that there was no evidence to show that the money was applied for partnership purposes; that it made no difference that the note had gone into the hands of a *bonâ fide* purchaser, as it had no validity at the outset; but that the plaintiff was not a *bonâ fide* purchaser since he knew the character of the partnership and had an opportunity to inquire of Cole with regard to the matter, and having the opportunity was in duty bound so to inquire, but wilfully neglected to make the inquiry.

L. E. Stanton and S. F. Jones, for the appellee.

1. The partner Cole alone makes defense against the note in suit. The substance of his defense is that it was executed for the private use of the partner McCarthy and that the note is a fraud upon Cole. In this defense he has totally failed. He did not show that the note was given for capital to be furnished by McCarthy, or for any private uses, nor that the proceeds were not for partnership uses, or that he (Cole) was in any manner defrauded thereby. He also had set up that the plaintiff is not a *bonâ fide* holder, but the court found the fact directly against him. Of course the burden of proving these averments was upon him. The plaintiff offered his note, proved the purchase of it for \$700 and the facts relating to the purchase, and rested his case. In this state of the proof the defendant offered no evidence as to the inception of the note, or for what purpose the money was borrowed, or to what uses the same was applied. The finding is that "there was no evidence to show that the money borrowed by McCarthy was applied for copartnership purposes, nor in what way it was used by him." But a partnership note is conclusively

presumed to be for partnership purposes until the contrary is shown. "If a purchase is made in the name of a firm or money borrowed and a note given or indorsed in that name, this is *prima facie* evidence of a debt from that firm, and it can only be rebutted by proof in the defense that this was fraudulently done by the individual partner for his own private use and that it was known to the creditor. Now the making and offering such a note is nothing more than a representation that the money is wanted for the use of the company, and as they confide in the individual they will be bound by his acts." *Etheridge v. Binney*, 9 Pick., 274. The same doctrine is laid down in numerous other cases. *Littell v. Fitch*, 11 Mich., 525; *Carrier v. Cameron*, 31 id., 373; *Barrett v. Swan*, 17 Maine, 180; *Le Roy v. Johnson*, 2 Peters, 197. This is true although the partnership be limited to a particular business, such as contracts to build sections of a particular railroad. *Holmes v. Porter*, 39 Maine, 157. The partnership being admitted, the presumption of law is that a note made by one partner in the name of the firm was given in the regular course of partnership dealing until the contrary is shown on the part of the defendants. *Doty v. Bates*, 11 Johns., 546. As the present case stands the sum of \$750 was loaned on this note to Cole & McCarthy for the purposes of their business, and was applied to such purposes by them.

2. The defendant Cole claims that this was a *non-trading* partnership, and therefore neither partner could bind it by a note. But the rule is not so broad as to exclude every partnership which does not buy or sell goods from binding itself by notes. "Limitations upon the authority of one partner to represent his co-partners may also be imposed by the nature and usages of particular trades. The fact that a partnership is engaged in a particular trade being known, is sufficient notice to third persons of the limitations which the nature and customs of that trade place upon the power of each partner." *Parsons on Partnership*, 99, note *y*. And it has been held that lawyers, physicians, farmers, taverners and the like have not, when partners, the general power to

bind the firm by note. Yet planters may, when it is their custom to borrow money, be bound by a firm note. *Lea v. Guice*, 13 Sm. & Marsh., 656. So of partners in the business of farming and coopering. *McGregor v. Cleveland*, 5 Wend., 475. So also of partners for the mere purpose of selling territory for the enjoyment of a particular patent right. *Barrett v. Flint*, 45 Verm., 44. Even in a non-trading partnership the power does exist if there be either necessity or usage for it as shown by the practice of the firm. *Davis v. Richardson*, 45 Miss., 508; *Gray v. Ward*, 18 Ill., 32. It is binding if it is according to the usual course of their business. *Livingston v. Roosevelt*, 4 Johns., 279, note. In this case the necessity and usage were both abundantly shown. The firm owed \$900 for chairs. It was doing business at an expense of \$350 per week, and McCarthy was the active manager residing in Hartford, but had little or no means. Cole was in Bridgeport sending checks from time to time. McCarthy was obliged to apply to the plaintiff to loan money on the checks, and once borrowed money from him without any voucher. A partnership the object of which was to get out lumber and bring it to market, had an agent who gave several notes to workmen for labor and services. Held that the notes were binding. *Tappan v. Bailey*, 4 Met., 529. This firm of theatrical managers were incurring debts of \$350 per week, mostly for labor and services, and the same necessity existed as in the case just cited.

3. Even if one partner has no right as against his co-partner to make or issue a firm note, or if he misapplies the proceeds, yet the note is binding in the hands of a third person who is ignorant of the defect or fraud. "And it is equally true there are instances in which one partner may bind the firm by a contract in which the firm has no interest; as when one partner gives out a negotiable note made in the name of the firm to a party who indorses it to another party for value, and the last party receives it without any knowledge that it was not made for a partnership transaction." Per WALDO, J., in *Mix v. Muzzy*, 28 Conn., 190.

See also *N. York Firemen's Ins. Co. v. Bennett*, 5 id., 579; *Moriarty v. Bailey*, 46 id., 592; *Blodgett v. Weed*, 119 Mass., 215, 220; *Hayward v. French*, 12 Gray, 456; *Onondaga County Bank v. DePuy*, 17 Wend., 47. When the partner offers the note in the usual course of the business there is the requisite authority, and his misapplication of the funds or fraud constitutes no defense. *Winship v. Bank of United States*, 5 Peters, 529, 563; *Onondaga County Bank v. DePuy*, *supra*.

LOOMIS, J.—The question involved in this case is, whether one member of a copartnership formed for the purpose of conducting a theater in Hartford, could, under the circumstances mentioned in the finding, bind the other member by executing a negotiable promissory note in the name of the firm for money borrowed.

The finding in terms excludes all express authority of the other partner, and even all knowledge of the matter on his part. So that any conclusion that the note is the note of the firm rather than of the member executing it, must necessarily rest on an authority to be implied. But here again the facts found so circumscribe the range of inquiry as to exclude all the ordinary sources of such authority.

The circumstances from which an authority may be implied are identical with those involved in a question of ordinary agency, for each partner is regarded as the accredited agent of the rest.

In many cases the decisive fact is found in the customary course of dealing, but not so here, for it is found that the note in question was the only note ever given in the name of the firm. The copartnership first commenced business in August, 1883, and on the 24th of the same month the note in suit was given. There was therefore very little time for a course of conduct or usage of any sort to grow up, giving any apparent authority.

The finding traces the money borrowed only into the hands of McCarthy, the partner who signed the firm name, and no fact appears showing directly or presumptively that

the act was necessary for any of the purposes of the partnership.

The only remaining source from which an authority may be derived by implication must be sought in the nature and scope of the partnership and in the nature of the act. And here, if we examine the legal principles that are applicable, it will be found not only that all such implication is wanting, but that the presumption is directly against the authority assumed. The weight of authority in the United States and the uniform tenor of the authorities in England will be found to establish a controlling distinction in respect to implied authority between commercial or trading and non-trading partnerships. Story on Partnership, 6th ed., § 102, *a*; 1 Lindley on Partnership, 4th ed. (by Ewell), top, page 266 and note 1 and cases there cited; 1 Collyer on Partnership, 648, 658; Metcalf on Contracts, 121, and cases cited in the notes.

In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business, and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions.

But when we pass to non-trading partnerships the doctrine of general agency does not apply, and there is no presumption of authority to support the act of one partner. Hence, in order to subject the firm upon a bill or note executed by one partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his co-partners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it.

That the partnership in question belongs to the non-trading class seems so obvious as to need no discussion. The brief in behalf of the defendant Cole cites many cases, and gives a long list of pursuits and professions

which those cases establish as of the non-trading class, and although the conduct of a theater is not there mentioned yet the analogies manifestly include it.

To show the existence of the distinction contended for and its application, we select from a multitude of authorities the following in addition to those previously referred to.

In *Judge v. Brasswell*, 13 Bush, (Ky.,) 67, the defendants were partners under an agreement to engage in mining business upon lands then leased or which might be thereafter acquired. One of the members of the firm purchased, without the others' consent, and took conveyances of mining land in the name of the firm, and gave the bills of the firm therefor. In an action by the payee of the bills against the firm, a defense was made by the other partners that the purchase was without their consent or ratification, and in the plea they renounced all claim to the lands purchased. The court held that the firm was not liable on the bills, saying that the power of one partner to bind his co-partners rests alone on the usage of merchants, and does not amount to a rule of law in any other than commercial partnerships. In non-commercial partnerships one who seeks to hold the firm bound upon a contract made by a single member, must be able to show either express authority or that such is the customary usage of the particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his co-partners with the requisite authority.

In *Hedley v. Bainbridge*, 3 Queen's Bench, 316, the defendants were attorneys in partnership, and one of the partners gave a note in the name of the firm to the plaintiffs for the balance of advancements made to one partner who was acting in behalf of the firm; the advances were to be laid out on mortgage by the firm. Lord DENMAN, C.J., in giving the opinion said:—"No doubt a debt was due from the firm"; but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is the usual course of

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mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business. * * * Upon the whole we think that the implied authority is confined to partners in trade."

In *Dickinson v. Valpy*, 10 Barn. & Cress., 128, the plaintiff was an indorsee for value of a bill of exchange drawn and accepted in the name of a mining partnership by order of its regular directors. It was held incumbent on the plaintiff to prove that the directors had authority to bind the company, and that it was necessary for the purpose of carrying on the business of the company or usual for other similar mining companies to draw or accept bills of exchange. Opinions were given by Lord TENTERDEN, C. J., and Judges BAILEY, LITLEDALE and PARKE, and the same distinction was made as in other cases between trading and non-trading partnerships. See also *Greenslade v. Dower & Coleman*, 7 Barn. & Cress., 685.

In *Levy v. Pyne & Richards*, tried before Baron ALDERSON, 1 Car. & Marsh., 453, it was held, that "if a bill of exchange or promissory note be drawn, accepted or indorsed, by one of two persons who are partners in a business which is not a trade (*e. g.* as attorneys), in the name of the firm, * * * the plaintiff must give evidence of the authority of the other partner to draw, accept or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority." See also *Richards v. Bennett*, 1 Barn. & Cress., 223; *Garland v. Jacob*, Law Reps., 8 Exch., 218.

In *Smith v. Sloan*, 37 Wis., 285, the court by LYON, J., after an able and exhaustive review of the authorities, adopted the following proposition as fully sustained:—"We gather from all the authorities that the distinction between a trading and non-trading partnership, in respect to the power of a partner to bind his co-partner by negotiable

instruments, is not limited to a mere presumption of such authority in one case and the absence of such presumption in the other, as the learned counsel for the plaintiff argued; but we think, and must so hold, that one partner in a non-trading partnership cannot bind his co-partner by bill or note, drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his co-partner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is upon the holder of the note, who sues upon it, to prove such authority, necessity or usage."

In *Ulery v. Ginrich*, 57 Ill., 531, the partnership was for farming purposes, and the note in suit was given by one in the name of the firm for money borrowed. It was held to be a non-trading firm, and the same principles were adopted as in the cases previously cited. In *Hunt v. Chapin*, 6 Lansing, 139, it was held, MILLER, P. J., giving the opinion, that the rule which authorizes one member of a copartnership to bind the firm, is only applicable to business of a trading nature, and has no application to partnerships for agricultural purposes or others of a similar character. See also *Kimbrow v. Ballett et al.*, 22 How., 256; *Graves et al. v. Kellenberger*, 51 Ind., 66; *Third National Bank v. Snyder*, 10 Misso. App., 211.

In Chalmers's "Digest of the law of Bills of Exchange, Promissory Notes and Cheques," second edition, pages 68 and 69, the following propositions are laid down as well settled rules:—"Art. 77. A partner in a trading firm has *primâ facie* authority to bind the firm by drawing, indorsing or accepting bills in the firm name for partnership purposes; and if the bill get into the hands of a holder for value without notice, the presumption of authority becomes absolute, and it is immaterial whether it were given for partnership purposes or not." "Art. 78. A partner in a non-trading partnership has *primâ facie* no authority to render his co-partners liable by signing bills in the partner-

ship name. The holder must show authority, actual or ostensible."

Many more authorities equally pertinent might be cited, but these will suffice to show that the distinction relied upon is strongly supported both in England and in the United States. While we feel constrained to adopt the distinction between the two classes of partnership so far as the presumption of authority or the want of it is concerned, we do not deem it necessary for the purposes of this case, or even quite reasonable, to carry its application so far as to deny absolutely, as some of the cases do, the right to recover on a note given by a non-trading firm for money borrowed for the firm and appropriated to its use, or on a note given in payment of its debts.

Some authorities ignore the test of liability referred to, but adopt another which is equivalent in result. Chancellor KENT, in his chapter on partnerships in the third volume of his Commentaries (7th ed.) p. 44, omits the use of the terms "trading" and "non-trading," and makes the distinction between partnerships in respect to the power of one partner to bind the firm depend on the single test of the usual scope of the business in connection with the subject matter of the contract.

This rule was adopted in *Crosthwaite v. Ross*, 1 Humph., 23, where it was held that one partner in the practice of medicine could not bind the firm by drawing a bill or note on which to raise money, because it was not within the scope of the partnership business. Though under a different name the real distinction here taken is between partners in trade and partners in an occupation.

Afterwards the same court, in the case of *Pooley, Barnum & Co. v. Whittemore*, 10 Herskell, 629, in a most able and elaborate opinion held that the liability of a partnership firm of the non-trading class to a bona fide holder of negotiable paper without notice, upon a note indorsed in its name by a member for his own benefit, would depend upon the nature of the business, the usage of trade and the course of dealing of the particular firm. It was also held that

where the nature of the partnership is such that it may or may not be proper to deal in negotiable instruments (as in that case, which was a publishing company), it was error in the circuit judge to charge without qualification that the firm was liable if the holder received the note before maturity in the due course of trade and without notice. We think the same principle under the circumstances of the case at bar made it error in the court below to hold the firm liable.

This court hitherto has had no occasion to give prominence to the distinction under discussion. The nature of the partnership business has however been made a ground for a presumption and a test of liability. In *Walcott v. Canfield et al.*, 8 Conn., 194, the defendants were partners in running a line of stages from Hartford to Albany and back. One of the partners by an advertisement promised to transport passengers and leave them at Albany in a specified time, upon which agreement the suit was based. The advertisement, being the act of one partner, was held not even admissible in evidence against the firm without previously establishing the authority of that one to bind the others. HOSMER, C. J., in delivering the opinion on page 198 said:—"A copartnership formed to transport passengers and their baggage in a stage, does not authorize one of the partners to bind the firm by an agreement that he will convey a person a certain distance within a specified time. Unless he had special authority he could only obligate himself by a contract not within the scope of the connection, and not his partners, who had never expressly or impliedly assented." The subject matter of the contract was different from the case at bar, but it seems even more closely connected with the scope of the business than the giving of the note in suit.

Many authorities lay down the unqualified proposition as if it was applicable to all partnerships, that if one partner raises money on a negotiable bill or note signed or indorsed in the name of the firm and which comes into the hands of a bona fide purchaser, the partnership is bound, although

it was in fact for the individual use of the acting partner. The doctrine is so stated in substance by this court in *New York Fire Ins. Co. v. Bennett*, 5 Conn., 574. The case shows that the partnership was a commercial one. We do not say however that public convenience does not demand the same rule in the case of non-commercial partnerships, where the holder was not advised of the nature of the partnership and its course of dealing or of other circumstances to put him on inquiry, and where the circumstances would justify the belief that he was dealing with the partnership. We may well leave this for future consideration, for upon the facts found we think the plaintiff's right was impaired by reason of what he knew in connection with the circumstances. We do not forget that the court below in terms found that the plaintiff purchased the note in good faith without notice of any defect. This of course means simply that there was no actual bad faith and no actual notice, and as matter of fact it is final, but at the same time the court found special facts as to the plaintiff's knowledge and action which we must also consider, and if we find constructive notice or constructive fraud the law must prevail.

The plaintiff as holder must stand affected by the nature of the partnership, of which he was fully advised. He purchased the note in the face of the presumption that it was unauthorized. To show the general nature of the facts which courts have held to be constructive notice, we cite a few cases.

In *Livingston v. Roosevelt*, 4 Johnson, 278, A and B formed a copartnership under the style of A & Co. in the business of sugar-refining, and so advertised in the newspapers. B afterwards, without the knowledge of A, bought a quantity of brandy, for which he gave a note indorsed by him with the name of the firm. The plaintiff, who was an indorsee of the note, took the newspapers in which the firm's business was advertised. KENT, C. J., after commenting on certain facts tending to show that the plaintiff knew that the purchase of the brandy was not a partnership concern, proceeded to lay down these principles:--

"But if the plaintiff did not in fact know that the purchase was made by C. I. Roosevelt on his own account and acted under the mistaken impression that it was a partnership purchase, still the firm were not bound by the indorsement, because the facts disclosed amounted to constructive notice or notice in law. * * * When a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of the law will be that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be circumstances to destroy that presumption. 'If,' says Lord Eldon, (8 Vesey, 544) 'under the circumstances the person taking the paper can be considered as being advertised that it was not intended to be a partnership proceeding, the partnership is not bound.' Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting house, the sign, &c., are the usual and regular indicia by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. * * * When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals."

In 1 Collyer on Partnership, p. 650, it is said that "a note given by one partner in the partnership name, *within the scope of the partnership*, is binding upon the firm, but the payee is *bound to know* whether it is within the scope of his apparent authority, and if it is in excess thereof the firm is not responsible."

In *Cocke v. Branch Bank of Mobile*, 3 Ala., 175, the note in suit was signed in the partnership name of J. F. & W. Cocke, who were partners in keeping a tavern. It was exe-

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cuted by J. F. Cocke, and payable to Lea & Langdon for their accommodation, without the knowledge of the other partner, Woodson Cocke. No actual knowledge of the circumstances was shown on the part of the bank, which sued as indorsee, but it was assumed to have been the duty of the bank to make inquiry. GOLDTHWAITE, J., in delivering the opinion said (p. 180:)—“The law presumes that the bank, if it inquired at all into the partnership of the defendants, must have received information that they were not partners in a mercantile trade, but only in the business of tavern keeping. This ascertained, it took the note at its peril, and must have relied on the faith of the indorsers.” It was held that Woodson Cocke, the partner who had no knowledge of the transaction, was not liable.

In the case at bar the plaintiff had full and actual knowledge of the nature of the partnership, and the law attributed to him knowledge also that one partner could not bind the other by bill or note without authority, and knowing as he did that the note had been written and signed by McCarthy, who was irresponsible, and that if he purchased it it would be upon the credit of Cole alone, and having also actual knowledge of a course of dealing which avoided McCarthy and pointed to Cole alone as the financial representative of the firm, it seems to us the plaintiff took the note at his peril. It was very strange for the plaintiff to inquire of the one who had used the firm name if it was the note of the firm, and omit entirely, when he had ample and easy opportunity, to inquire of the other partner on whose sole credit he depended; but the court has found that the failure to inquire of Cole was not owing to a belief that inquiry would result in finding the note invalid, and this we must accept as true. Ordinarily such a finding would save the rights of a holder in good faith of negotiable paper, but the great difficulty in the present case is, that the note was purchased with constructive notice that it was not within the apparent scope of the partnership business and *prima facie* was not the note of the firm; and the actual course of business, so far as it was known to the

plaintiff, tended to increase rather than allay the suspicion of a want of authority.

But the plaintiff contends that the judgment in his favor cannot be disturbed because the burden of proof was on the defendant. On this general subject of the burden of proof most of the authorities cited in another connection to show the distinction between the two classes of partnerships, and many others that we might cite, assert most positively that in the case of non-commercial partnerships the burden is on the holder of the note. But we concede that many cases can be found which in terms would seem to place the burden on the defendant.

In some of these cases the partnerships were in fact commercial, as in the case of *Fales v. Jordan*, 44 Miss., 283. In *Doty v. Bates & Handy*, 11 Johns., 544, PLATT, J., giving the opinion, said:—"The partnership being admitted, the presumption of law is that a note made by one partner in the name of the firm was given in the regular course of partnership dealings, until the contrary is shown on the part of the defendants." The case is so brief in the report that we cannot see clearly what was involved in the admission of the partnership which furnished the basis for the presumption. It incidentally appears in the description of the firm that its business was tanning, currying and shoe-making. This doubtless involved the buying of hides, bark and materials for tanning, and the sale of leather and shoes. The basis of the presumption was doubtless the apparent scope of the business.

In *Holmes v. Porter*, 39 Maine, 157, the head note omits an important qualification. The proposition laid down by the court is, that "when the contract is made in the name of the firm it will *prima facie* bind the firm, *unless it is ultra the business of the firm.*" The head note omits the last clause.

The case of *Carrier v. Carrier*, 31 Mich., 373, was relied upon by the plaintiff to show that the burden was on the defendant. In terms it so holds, but a brief analysis will show that it is not inconsistent with our position in this

case, and will suggest a mode of reconciling many apparently conflicting cases. There was nothing at all in the case to show the nature of the partnership and the plaintiff's knowledge of it. GRAVES, C. J., in giving the opinion stated the question as follows:—"Was the plaintiff below required, in order to make out a *prima facie* case, to show at the outset that Carrier had express authority to make notes generally, or else to show either that the copartnership was one of the class in respect to which such authority is presumed, or that its course of business had been such as to imply authority, or that the signing by Carrier had been approved or ratified? The question was answered in the negative upon the authority of *Littell v. Fitch*, 11 Mich., 525.

It is to be noticed that the question was simply as to the burden of proof *after the fact of partnership was admitted* and before the nature or class of the partnership appeared. That being the position of the case the court well remarked that "it was not needful for the plaintiff by any positive averment or positive proof to negative a defense which in virtue of a general presumption would be intended not to exist. He could not be required to go into particular proof on such a point until some proof should appear in contravention of the presumption." In this statement of the law we fully concur, but it is not applicable to the facts in the case at bar, because the controlling fact in the proposition is wanting; proof in contravention of the presumption which at the outset was in favor of the plaintiff had appeared and had resulted in the finding of the opposing facts; and it is significant that all the facts which the above question impliedly concedes to be sufficient to overcome the presumption referred to are distinctly found, namely, that there was no express authority to make notes generally or to give this note; that the partnership was of the non-trading class, in respect to which no authority can be implied; that there was no course of business that could imply authority; and that the giving of this note had never been ratified or approved by Cole. Whatever presumption therefore there might have been in favor of the plaintiff at the outset had

been fully overcome, and if there exists any further fact from which an authority might be implied the plaintiff must show it or lose his case.

It is manifest that ⁱⁿ the Michigan case, as indeed all the cases treating of the burden of proof in suits on notes alleged to have been executed by partnerships, an illegitimate use has been made of the term "burden of proof." Properly it is applied only to a party affirming some fact essential to the support of his case. Thus used it never shifts from side to side during the trial. Loosely used, as in the cases referred to, it is confounded with the *weight of evidence*, a very different thing, which often shifts from one side to the other as facts and presumptions appear and are overcome, and in this indiscriminate use of the term "burden of proof," much of the apparent conflict in the cases has its origin. For, after all, the test of the burden of proof is very simple, and so is the question of the weight of evidence, and there is no contrariety in the principle adopted by the authorities. In the light of principle we think it may be demonstrated that the position of the plaintiff is untenable. A partnership has been sued on a note executed in its name. Upon the trial the note is produced by the plaintiff and the first question is—was it the note of the firm? The plaintiff takes the affirmative of this issue, because if no evidence is offered on either side he must fail; he has then the burden of proof, and it remains on him and does not pass at all to the defendant. But suppose now it is shown or admitted that the partnership alleged exists, and that one of the firm executed and delivered the note in its name. By virtue of the general presumption that authority was given by the partnership, the plaintiff is entitled to recover, if nothing further appears, because the weight of evidence is on his side. But suppose the defendants take their turn, and prove the identical facts here found—that there was no authority general or special given—no ratification of the act—no course of dealing to imply authority; and furthermore that the partnership was of a class from which no authority can be implied. Is the



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plaintiff now entitled to a verdict? Has he proved that the note was the note of the firm? Surely not. What then is left on which to rest his case. The preponderance of evidence is not with him. The burden upon him to show that it was a partnership note has not now been met. But it is said that there is a realm of inquiry not touched by either party, that is, that it was not shown whether or not the partnership had the benefit of the consideration of the note. If such a fact appeared we concede for the purposes of this case that it would tend to show that the note was the note of the firm. But if an authority could not be implied as the case stood before, can it now be implied? The case stands precisely as before, there can be no change in the weight of the evidence because nothing has been added, and the claim of the plaintiff would seem to be reduced to the absurdity that he is to have the same benefit from an unproved fact as from one proved.

There was error in the judgment complained of, and as against the defendant Cole it is reversed and a new trial ordered.

In this opinion the other judges concurred; except GRANGER, J., who dissented.

SAMUEL D. NEWELL *vs.* NEWTON SMITH.

The plaintiff sold the defendant a cow, for which he was to pay one hundred dollars if she was with calf and forty dollars if she was not. Six months later both parties concluded that she was not with calf, and in settling another matter in which the plaintiff was to pay the defendant fifty dollars, he turned in the cow at forty dollars and paid ten dollars in cash. Afterwards the cow proved to have been with calf at the time of the sale. Held that the plaintiff was entitled to recover the remaining sixty dollars for her.

[Argued May 19th—decided August 28th, 1885.]

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ACTION to recover for a cow sold; brought by appeal from the judgment of a justice of the peace, to the Court of Common Pleas of Hartford County, and tried to the court before *Bennett, J.* The court found the following facts:—

On the 18th of October, 1883, the defendant bought of the plaintiff two Jersey cows—one known as “Kittina” and the other as “Colt’s heifer.” For the cow Kittina he agreed to pay \$100 if she proved to be with calf at the time of the purchase, but if she was not he was to pay but \$40. Payment was to be made within a reasonable time. For Colt’s heifer the defendant agreed to pay, and did pay, \$202.50. At the time of the purchase the plaintiff believed that she was forty per cent. of the blood of Albert 44, and so represented to the defendant. Several months afterwards the defendant found that the heifer was not forty per cent. of the blood of Albert 44, but much less. He communicated his knowledge of this to the plaintiff, and it was agreed between them that the plaintiff should pay the defendant \$50 damages because of the defect in pedigree. The plaintiff and defendant met on the 16th of April, 1884, and then they agreed that the \$50 should be paid by turning in the cow Kittina at \$40, and the payment of \$10 in money by the plaintiff, which he then paid to the defendant.

Previously to the date of this agreement the plaintiff had twice looked at the cow Kittina to see if she was with calf, the last time being in the latter part of March, and as a result of his examination he believed she was not with calf. And at the date of April 16th both the plaintiff and defendant believed she was not with calf, and in making the agreement of that date both acted upon that belief. The cow however on the 28th of June, 1884, dropped a calf, two hundred and fifty-four days after the date of the purchase. It was in evidence that the length of pregnancy with cows is about two hundred and eighty-three days.

The plaintiff having learned that she had dropped a calf, made demand of the defendant on the 21st of July for the payment of the \$60, which he claimed was due him by the

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terms of the original sale. The defendant replied in substance that the agreement of April 16th was a full settlement between them.

According to the testimony on the trial given by both plaintiff and defendant of the terms of payment for the cow Kittina, that payment was not due on April 16th.

The proposal of the plaintiff providing for the payment of the \$50, as communicated to the defendant, contained no reservation covering the contingency of her having a calf, in which event the plaintiff would then be entitled to receive from the defendant the full sum of \$100.

The plaintiff was not led into the agreement relying upon any representations made by the defendant.

The court finds upon the above facts that the agreement of April 16th was a full settlement of the respective claims of the plaintiff and defendant, and that there is nothing due to the plaintiff on the sale of the cow Kittina.

The court having rendered judgment for the defendant, the plaintiff appealed to this court.

J. J. Jennings, for the appellant.

F. L. Hungerford, for the appellee.

GRANGER, J. The plaintiff sold the defendant a Jersey cow called "Kittina" and a Jersey heifer called "Colt's heifer" on the 18th of October, 1883. For the cow the defendant agreed to pay \$100, if she should prove to be with calf; but if she was not he was to pay but \$40. The heifer was honestly represented by the plaintiff to be of a certain pedigree, but proved to be of less pure blood, and the defendant claimed \$50 damages, which the plaintiff admitted that he was entitled to; and on the 16th of April, 1884, the parties met and agreed that the \$50 should be paid by turning in the cow Kittina at \$40 and paying \$10 in cash, which sum the plaintiff then paid to the defendant.

At this time both parties were satisfied that the cow was not with calf, and that therefore under the original contract

the plaintiff was entitled to only \$40 for her, and in making the settlement both parties acted on that belief. It proved however that she was with calf, and had been at the time she was sold, as she had a calf on the 18th of the following June.

The defendant claims that the settlement was a full and final one of the whole matter of the purchase, and that the plaintiff is not entitled to the \$60 additional which he was to have had by the original contract if the cow was then with calf. The plaintiff claims that the settlement was made under a mutual mistake as to the condition of the cow, and that he may now fall back on the original contract and recover the \$60.

It is clear that the settlement was merely of the \$50 damages claimed by the defendant, and assented to by the plaintiff, for the failure in pedigree of the heifer. In paying that \$50 the cow Kittina was turned in at the price which by the original contract the plaintiff supposed he was bound to accept, and which the defendant supposed was all that by that contract he was bound to pay. The case does not stand differently from what it would if the defendant had paid the plaintiff the \$40 in cash, under the mistake of both parties as to the cow's condition. As soon as the mistake was discovered the defendant would be bound to correct it, by paying the remaining \$60. If the settlement had been in writing and made in terms to cover the whole matter, yet, being made under a mistake of both parties as to an important fact, it could have been corrected.

The plaintiff is clearly entitled to recover the \$60 remaining unpaid for the cow.

There is error in the judgment, and a new trial is ordered.

In this opinion the other judges concurred.

THE STATE *ex rel.* JOHN W. COOGAN *vs.* JOSEPH L.
BARBOUR.

A city charter provided that the common council in joint convention should appoint a prosecuting attorney, but gave no direction as to the mode of appointment, and the convention had no power of removal. The convention met for the purpose of making the appointment and voted "to proceed to ballot for a prosecuting attorney." A ballot was taken and the relator had a clear majority of all the votes cast and of the whole convention, and the result was announced by the presiding officer. A member then offered a resolution declaring the relator elected. This resolution was lost. Two resolutions were then offered, one declaring the ballot taken void by reason of errors in it (which it was found did not exist,) and the other declaring the defendant "elected and appointed prosecuting attorney;" both of which resolutions were passed. Held that the convention by its ballot had elected the relator, that no resolution declaring him elected was necessary, and that the later resolutions declaring the ballot void and the defendant elected were of no effect.

[Argued May 20th—decided June 8th, 1885.]

INFORMATION in the nature of a writ of quo warranto, filed in the Superior Court in Hartford County

The information set forth that it was provided by the law of the state and by the charter and ordinances of the city of Hartford that a meeting of the entire Court of Common Council in joint convention should be holden yearly on the second Monday after the annual city election, for the choice of a prosecuting attorney for the city and of other city officers; that on April 20th, 1885, being the second Monday after the annual city election for that year, a meeting of the entire Court of Common Council of the city was held for the choice of the city officers then to be chosen in joint convention; that the relator was at that meeting duly chosen prosecuting attorney of the city for one year from April 21st, 1885, and had accepted the office and taken the oath of office required by law; but that Joseph L. Barbour of said city had, notwithstanding such election, acceptance and qualification of the relator, on the 22d of April, 1885, without any legal warrant or right, usurped and held pos-

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session of and had from that time exercised said office of prosecuting attorney for the city and claimed to be entitled to the office; praying that process of law might be awarded against him requiring him to answer by what right he claimed to hold the office.

Barbour was cited in by the court to show cause, and filed the following answer:

That on the 19th day of April, 1884, said day being the second Monday after the annual city election of the city of Hartford, at a joint convention of the entire Court of Common Council of said city, held in accordance with the charter and ordinances thereof, for the choice and appointment of a prosecuting attorney for said city, and of other officers, for the term of one year and until successors should be appointed and qualified, the defendant, Joseph L. Barbour, was duly chosen and appointed by a major vote of the entire Court of Common Council, so assembled in joint convention, to be prosecuting attorney of said city for one year thereafter and until his successor should be chosen and qualified; and the said Joseph L. Barbour accepted said office, and duly qualified therefor, and entered upon the discharge of the duties thereof, and has ever since continued in the discharge of said duties.

And defendant further saith that at the meeting of the entire Court of Common Council, held April 20th, 1885, as set forth in the information, for the choice and appointment of prosecuting attorney and other officers, a member of said convention moved that the convention proceed to ballot for prosecuting attorney, and the motion prevailed, said motion being the first business proposed in or transacted by said convention relative to said office. A ballot was then taken, and it was announced by the presiding officer of said joint convention that forty-seven ballots had been cast, of which John W. Coogan had twenty five, Joseph L. Barbour had twenty-one, and there was one blank ballot; whereupon a member of said convention offered the following resolution:

"Resolved, that John W. Coogan be, and he is hereby declared elected prosecuting attorney in and for the city of

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Hartford, for the year ensuing and until his successor is elected and qualified."

The yeas and nays were ordered on the passage of the resolution and it was defeated; twenty-two members of the convention voting in the affirmative and twenty-five members in the negative, and the resolution was declared lost.

A member of the convention then offered the following preamble and resolutions:

"Whereas the yea and nay vote just taken on the resolution relating to the election of prosecuting attorney clearly shows that there was an error in the ballot which was declared to elect John W. Coogan prosecuting attorney:

"*Resolved*, that the aforesaid ballot be and is hereby declared null and of no effect by reason of errors in the same; and

"*Resolved*, that Joseph L. Barbour be, and he is hereby elected and appointed prosecuting attorney in and for the city of Hartford, for the year ensuing and until his successor is chosen and qualified."

Whereupon a member of the convention moved that the convention be dissolved, and a yea and nay vote being ordered and taken, the motion to dissolve the convention was defeated by twenty-two yeas to twenty-five nays.

A member of the convention then moved to table said preamble and resolutions and the motion was defeated by twenty-one votes in the affirmative, and twenty-four votes in the negative. Whereupon the yeas and nays were ordered on the adoption of the preamble and resolutions, and, upon the taking of the vote by yeas and nays, twenty-five of the members of said joint convention voted in favor of said preamble and resolutions and twenty-two of the members voted against them, and said resolutions were thereupon declared passed by the presiding officer of said joint convention, and Joseph L. Barbour was declared elected prosecuting attorney in and for the city of Hartford for the year ensuing and until his successor is chosen and qualified.

And thereupon on motion of a member of said conven-

tion, said joint convention was dissolved and thereafter did not reassemble.

And the defendant says that the twenty-five votes so given as aforesaid for the resolution last recited, constituted a major vote of the entire Court of Common Council, and that thereby he was chosen and appointed prosecuting attorney in and for the city of Hartford, for the ensuing year and until his successor is chosen, and was so declared, and has accepted said office, and being duly qualified has lawfully and of right entered upon, and lawfully and of right continues in, the discharge of the duties of said office.

And so the defendant says that since the 19th day of April, 1884, when as aforesaid he was chosen and appointed prosecuting attorney of the city of Hartford for the term of one year and until his successor should be chosen and qualified, neither the said John W. Coogan nor any other person save the defendant himself has been duly and legally chosen and appointed to said office and qualified therefor as successor to the defendant, but that instead the defendant himself was as aforesaid, on said April 20th, 1885, duly and legally chosen and appointed to said office for the ensuing year and until his successor is chosen and qualified, and has accepted the same, and being duly qualified is legally exercising the duties thereof.

And so this defendant denies that he has ever exercised, claimed, usurped, or now exercises, claims, or usurps any office of prosecuting attorney in and for the city of Hartford, of or rightfully belonging to said relator.

All of which things the defendant is ready to verify as this court shall award, and thereupon he prays that said office, privileges, and franchises may be adjudged to him, and that he may be dismissed by the court of and from the premises charged upon him as aforesaid.

To this answer the State's Attorney filed the following replication:—

That true it is that at said meeting of the Court of Common Council in joint convention, held on April 20th, 1885, proceedings were had and a resolution appointing said Bar-

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bour prosecuting attorney was passed, as alleged in said plea; but the said attorney further says that said resolution so appointing said Barbour, passed by said convention after said convention had voted to appoint a prosecuting attorney by ballot, and in pursuance of said vote had taken a ballot, upon which ballot said John W. Coogan received a majority of votes, was passed by said convention without any investigation as to the existence of any errors in the ballot so taken, although the assumed existence of such errors was by said convention declared to be the reason and justification of said resolution; and further says that there was in fact no error whatever in said ballot, but that on the contrary, said ballot was a valid ballot, and said Coogan, by the ordering, casting, counting, and declaration of said ballot, was legally elected prosecuting attorney, as alleged in the information; and this the said attorney is ready to verify; wherefore the said attorney prays judgment, and that the said Joseph L. Barbour may be convicted of the said premises.

To this replication the defendant demurred, assigning the following grounds of demurrer:—

1. That it is immaterial whether said ballot was in fact erroneous or not, as said meeting had power notwithstanding the taking said ballot to appoint said Barbour to said office by resolution.

2. That the legal effect of said ballot was not to appoint said Coogan to said office of prosecuting attorney.

3. That the legal effect of the proceedings set out in the answer of the defendant was to appoint said Barbour to said office, whether said ballot was in fact erroneous or not.

The court, (*Andrews, J.*.) overruled the demurrer, and held the replication sufficient, and rendered judgment for the plaintiff. The defendant appealed.

C. E. Perkins and *C. J. Cole*, for the appellant, cited *State ex rel. Miller v. Foster*, 2 Halst., 101; *Conger v. Gilmer*, 32 Cal., 75; *Attorney Gen. v. Simonds*, 111 Mass., 259; *Baker v. Cushman*, 127 id., 105; *Putnam v. Langley*, 138

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id., 204; *State ex rel. Cole v. Chapman*, 44 Conn., 595; *Trustees of School District v. Gibbs*, 2 Cush., 89; *McCrary on Elections*, § 444.

W. Hamersley, State's Attorney, and *W. C. Case*, for the appellee, cited—*State ex rel. Waterbury v. Martin*, 46 Conn., 479; *Thomas v. Burns*, 23 Miss., 550; *Taylor v. Commonwealth*, 3 J. J. Marsh., 404; *Achley's Case*, 4 Abb., Pr. R., 35; *Marbury v. Madison*, 1 Cranch, 137; *People ex rel. Kresser v. Fitzsimmons*, 68 N. York, 518; *Hoke v. Field*, 10 Bush, 144; *Conger v. Gilmer*, 32 Cal., 75; *People ex rel. Mosher v. Stowell*, 9 Abb. New Cases, 456; *State ex rel. Cole v. Chapman*, 44 Conn., 595; *Cushing's Law of Legis. Assemblies*, §§ 99, 205; *State ex rel. Wright v. Warren*, 1 Houst., 39; *Cush.*, *Story and Josslyn's Mass. Controverted Election Cases*, 7, 20, 151, 201, 215.

CARPENTER, J. The charter of the city of Hartford provides that the Common Council, in joint convention, shall appoint a prosecuting attorney, but gives no direction as to the mode of appointment. The convention therefore is at liberty to proceed as it pleases, by ballot, by resolution, by the adoption of a verbal motion or in any other manner. In this case a member moved that the convention proceed to ballot for a prosecuting attorney, and the motion prevailed. Thereupon a ballot was taken and the relator had a clear majority of all the votes cast, and of the whole convention. After the result was announced another member of the convention offered a resolution declaring the relator elected. That resolution, on a yea and nay vote, was lost. Two resolutions were then offered; the first declaring the ballot just taken null and of no effect by reason of errors in the same, and the other declaring that Joseph L. Barbour "is hereby elected and appointed prosecuting attorney, &c." These resolutions were passed.

The question is, which of the two candidates was ap-

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pointed. The Superior Court held that the relator was appointed, and the defendant appealed to this court.

It will be observed that the business of the convention was limited to making appointments. For all the purposes of this case we may assume that its sole business was to appoint a prosecuting attorney, and that it had no other powers or duties. It had but one thing to do and, when that was done, its powers were exhausted. Unlike legislative bodies convened for purposes of ordinary legislation, it had no power to enact and repeal, and its power to reconsider was very limited, being confined to the preliminary proceedings. The term of office is prescribed by the charter—"for the term of one year, and until his successor is chosen and qualified." The power of removal is not vested in the convention. It follows that when the appointment was once made the title to the office vested in the appointee, and it was not in the power of the convention to take it from him.

The question then is reduced to this—was the relator appointed by the ballot? In behalf of the defendant it is contended that he was not; that the ballot should be regarded as an informal one; that the convention, as appears by its subsequent action, manifestly contemplated and intended that the passage of a resolution declaring the candidate receiving a majority of votes elected, should be the act of appointment; and that until that is done, even until the convention has adjourned, the proceedings are *in fieri*, and it cannot be said that an appointment has been made.

In behalf of the relator it is contended that the vote of the convention to proceed to ballot for a prosecuting attorney was equivalent to, and must be regarded as, a vote to elect or appoint a prosecuting attorney by ballot; that when the result was announced the appointment was complete, nothing more being required; that the relator thereby acquired a vested right to the office, and that it was not in the power of the convention by its subsequent proceedings to deprive him of it.

We are inclined to think that the view presented by the counsel for the relator is the better one. If the convention had adjourned immediately after the result of the ballot was announced, we think it must be conceded that Mr. Coogan would have been legally appointed. The adjournment would have indicated that the convention regarded its duty as fully performed. But the convention proceeded to consider and vote upon resolutions declaring the respective candidates elected. This proceeding may be accounted for on one of two grounds; first, the convention may not have regarded a resolution as essential to an appointment, but simply as a more formal and orderly declaration of the result. Secondly, that the convention considered the resolution as necessary to an appointment. In the former case it is evident that the resolution would not give efficacy to the ballot nor add to its force and effect. In the latter it is equally apparent that the views of the convention as to the necessity of a resolution would not be conclusive. So that the question remains, notwithstanding the subsequent action, was the result of the ballot a legal election? If that was its effect without the subsequent action, we think it must have the same force with it.

It was doubtless competent for the convention to have determined in advance that the appointment should be made by the passage of a resolution, that the ballot should be an informal one, or that it should be a method of selecting a candidate to be appointed by resolution. In such a case there would have been no appointment prior to the passage of the resolution. But such was not the action of the convention. The vote was, not to take an informal ballot, not to select by ballot a person to be appointed, but to ballot for a prosecuting attorney. The ballot we think was understood and intended to be an election; and an election was an appointment.

We interpret the vote to ballot as equivalent to a vote to elect or appoint by ballot—as a vote determining the method by which the appointment should be made. After the passage of that vote an appointment by any other method

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would not have been in order—would not have been according to parliamentary usage. If the convention had omitted the ballot, and made the appointment by resolution without first rescinding the vote to ballot, it might perhaps have been a legal appointment, on the ground that there was an implied rescission, but it certainly would have been irregular. But that course was not taken. After voting to ballot a ballot was actually taken which resulted in an election by a clear majority. Then, without any vote changing the method, the convention proceeded to pass a resolution which declared another man elected and appointed. In addition to the irregularity of not following the prescribed method, they departed from it after the thing to be done had been done. The convention decided to appoint and did appoint by ballot, and then appointed another man by resolution.

We have said that the appointment was made when the result of the ballot was ascertained and declared. Nothing more was required of the convention. Its will had been expressed in a parliamentary and legal method, had been duly declared, and had become a matter of record. Declaring the result by resolution was unnecessary. No certificate or commission from the convention or its officers was required by law. Mr. Coogan's right to the office vested at once, and he might without further ceremony accept and qualify.

We do not wish to be understood as denying the power of the convention to correct errors and to nullify the effects of fraud. If there was a palpable error or fraud, or if the ballot for any cause was illegal, the convention might undoubtedly treat it as void, and proceed to another election. If we were to look only to the resolutions which passed we might assume that there was an error in the ballot and so give effect to the resolution. But the pleadings show that it was admitted that there was in fact no error or mistake. The mere declaration that there was an error when there was none, and the attempt to nullify the appointment on that ground, cannot be vindicated.

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These views are believed to be in harmony with the best and most carefully considered cases. Appointments to office, by whomsoever made, are intrinsically executive acts. It has been so held when the appointment was made by a court. *Taylor v. Commonwealth*, 3 J. J. Marsh., 401. Also when made by the common council of a city. *Ackley's Case*, 4 Abbott's Prac. R., 35. And when made by an executive officer. *Marbury v. Madison*, 1 Cranch, 137.

When the appointing officer or body has not the power of removal, if the power to appoint has been once exercised it is irrevocable, and the appointee will hold office during the term. *Marbury v. Madison*, *Ackley's Case*, *supra*; *Cole v. Chapman*, 44 Conn., 601; *Putnam v. Langly*, 133 Mass., 204.

An appointment is complete when the last act required of the appointing power has been performed. The signing of a commission by the president of the United States, when the appointment was made by him, and the law required a commission, was held to be the last act. *Marbury v. Madison*, *supra*. Also a writing signed by the mayor of a city making a nomination to be confirmed by the common council, under the erroneous belief that such confirmation was necessary, although it was not required by law. *People v. Fitzsimmons*, 68 N. York, 514. In the case of a judicial appointment a declaration in open court, when the law does not require the appointment to be in writing, has been held to be final. *Hoke v. Field*, 10 Bush, 144. In *Ackley's Case*, *supra*, it was held that the appointment was made when both branches of the common council concurred in the passage of a resolution making the appointment. So also in *People v. Stowell*, 9 Abbott's New Cases, 456. In *Conger v. Gilmer*, 32 Cal., 75, the law required that justices of the peace appointed by the board of supervisors should receive a commission signed by the officers of the board and sealed with its seal; it was held that a commission so signed and sealed was the only evidence of an appointment. If however such formal act is to be performed by some other than the appointing power it constitutes no part of

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the appointment. *Marbury v. Madison, supra; People v. Stowell, supra.* Such formal acts in such cases are mere ministerial acts.

The case of *Marbury v. Madison, supra*, is worthy of a more extended notice. In that case nearly all the important principles involved in this were promulgated by the Supreme Court of the United States in an elaborate opinion by Chief Justice MARSHALL, in which the whole subject is exhaustively considered.

President Adams, under a law of Congress, nominated certain persons to be justices of the peace in the district of Columbia, and the nominations were confirmed by the senate. The law required that the appointees should be commissioned by the president under the great seal of the United States. The appointment was for a term of five years. The president signed the commission and the seal, under the statute, was affixed by the secretary of state, by whom alone it could be affixed. The commission however was not delivered. The persons appointed applied to the Supreme Court for a mandamus to compel its delivery. On a rule to show cause the court held that the appointment was complete, and that the persons therein named were legally entitled to the office; but discharged the rule on the ground that the cause was not within the jurisdiction of the court.

The opinion shows that in some cases there is a distinction between the acts of appointing to office and commissioning the person appointed. "It follows," say the court, "from the existence of this distinction, that if an appointment was to be evidenced by any public act other than the commission, the *performance of such public act would create the officer*, and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it." Again—"This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable,

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it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it."

It was then held that the appointment was made when the last act required of the president was performed. On this point the court says:—"Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete. The last act to be done by the president is the signature of the commission. He has thus acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate, concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power has been performed."

The case then holds that affixing the seal to the commission was no part of the appointment, nor was it essential to its validity, it being a mere ministerial duty to be performed by a ministerial officer and not by the appointing power. "It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made."

It is then held that the power having been exercised, and the appointment made, the president could not unmake it

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and appoint another, notwithstanding the fact that the commission had not been delivered; and for the reason that the president had not the power of removal. On this point the court say:—"Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him."

The case of *Conger v. Gilmer*, 32 Cal., 75, is cited and relied on by the defendant. In that case it was decided that, "the appointment to office by the board of supervisors is not complete until the person appointed has received a certificate of his election under the seal of the board, signed by the proper officers of the board. An appointment made by a majority of the board may be revoked at any time before such certificate is issued and another person may be appointed. In the case of an election to office by the people the rule is different, and the issuance of a commission is a mere ministerial act." A statute of California required that the person appointed should receive a certificate of his appointment signed by the officers of the appointing body and sealed with its seal. The court, following the case of *Marbury v. Madison*, held that the appointment was not complete until the last act required of the appointing power had been performed; and that the last act was the issuance of a certificate signed and sealed as required by law. A United States statute made the secretary of state the custodian of the great seal and made it his duty to affix it whenever required. When, therefore, it was affixed to commissions issued by the president to complete an appointment made by him it constituted no part of the act of appointing,

but was a mere ministerial act attesting the verity of the presidential signature. In *Conger v. Gilmer* the signing and sealing of the certificate were acts to be performed by the board, the appointing power, being performed by its officers and by its immediate direction, and were properly held to be an essential part of the act of appointment—executive and not ministerial acts. So far that case seems to be in harmony with the views we have expressed, and is an authority quite as much in favor of the plaintiff as of the defendant; for in this case it will be remembered that no seal, no certificate, nor any act other than that actually performed, is required from the appointing power.

In that case it will be observed that the second appointment was made some days after the first and at a subsequent meeting. The board doubtless had continuing jurisdiction over the subject matter. But it is not contended that, when the law requires a convention to meet on a given day and make an appointment, the convention may meet on a subsequent day and revoke an appointment made at the time required.

The case of *Baker v. Cushman*, 127 Mass., 105, another case cited by the defense, was this:—The aldermen and councilmen, thirty-one in number, met in joint convention to appoint a city clerk. Baker received seventeen votes, but there were thirty-two votes cast. The convention declared the ballot void, and on a second ballot being taken Cushman was elected. The court held that his election was legal, saying that “it was within the lawful power of the convention, at the same meeting, and before the result of the election had been declared, to treat the proceedings already had as irregular and invalid, and to vote anew.” In that case there was a reason for setting aside the ballot. It may have been tainted with fraud. If fraudulent, the extent of the fraud could not be known, for several members entitled to vote may have refrained from voting, and several not entitled to vote may have voted; and possibly the fraudulent votes may have been required to make a majority. The convention had a right to insist, and it was due to the ap-

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pointee, that there should be a ballot free from any suspicion of fraud. Had there been a similar fact in this case, or any reason for declaring the ballot void, it would have presented a different question. We regard that case as consistent with the position we have taken.

The case of *Miller v. Foster*, 2 Halsted (N. Jersey), 101, was, like this, the case of an appointment by a joint convention of two bodies. It consisted of fifty-six members, of which only fifty-five were present and voting. On two ballots Miller had twenty-eight votes, but was not declared elected, the chair ruling that a majority of the whole number was necessary, in which ruling he was sustained by the convention. Another ballot was taken and Foster received thirty-one votes and was declared elected. The court held that Foster was legally elected. The court interrupted the counsel for the plaintiff with the announcement that their minds were made up, and then said "that all deliberative assemblies during their session have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done. In this case they had a right to reconsider any question which had been before them or any vote which they had made." We cannot regard that case as an authority controlling or materially influencing our decision, for several reasons. It was hastily decided and manifestly was not well considered. It confounds legislative proceedings with executive acts and applies the rules regulating the former to the latter, while such rules are applicable only to a limited extent. It assumes that the convention had power to *undo* as well as to *do*, to *remove* as well as to *appoint*. That may have been so in that case, while confessedly it is not so in this.

For these reasons a majority of the court holds that there is no error in the judgment of the Superior Court.

In this opinion LOOMIS and GRANGER, Js., concurred.

PARK, C. J. I regret that I am unable to concur in the views expressed by the majority of the court; and were it not that I am under a strong impression that the decision should be in favor of the defendant, I would silently acquiesce.

Two questions are presented for consideration. The first is, was the vote by ballot, that was taken at the commencement of the proceedings of the convention, of a character to elect the relator? If not, then the relator is not entitled to the office of prosecuting attorney of the city, for it is not pretended that he was afterwards elected. If it was, then the question is—had the convention the legal right to alter, change, or annul the vote that had been taken, at any time during its continuous session, and before its dissolution? If it had, then the relator is not entitled to the office, for in that case it seems to be conceded that the convention nullified the vote by ballot, and afterwards elected the defendant to the office.

Was the ballot of a character to elect the relator, is the first question in order to be considered.

The vote by ballot was preceded by a vote in the following words—"That the convention proceed to ballot for prosecuting attorney." There is nothing in this language to indicate whether the vote to be taken by ballot was to be formal or informal. It is just as consistent with one construction as with the other. It is ambiguous in this respect, and it becomes important to consider which construction was given to it by the members of the convention when the ballot was taken; for if it was then regarded and treated by them as an informal ballot, law and reason unite in declaring that it was, in fact, such a ballot to all intents and purposes. There is no necessity for citing authorities in support of this position, for there is no room for controversy. What construction, then, did the members of the convention put upon the balloting?

In the first place the presiding officer of the convention must have regarded it as an informal ballot, or else he would have declared the relator elected after announcing

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the result of the vote. The ballot was immediately followed by a resolution declaring the relator elected. What was the necessity of this resolution if he had just been elected? The majority of the court say there was none. Had this resolution passed, the relator would have been elected notwithstanding the character of the ballot. But the resolution was voted down. Two members of the convention, who balloted for the relator, voted against him on the resolution. How can these contradictory acts be reconciled except upon the theory that these members regarded the ballot as informal, and so cast complimentary ballots for the relator, but on the passage of the resolution, knowing it would elect him if passed, voted against him.

This resolution was followed by another declaring the defendant elected to the office of prosecuting attorney. This resolution, after various motions to defeat its passage had been voted down, was passed by a yea and nay vote of the convention.

During all these hotly contested proceedings not a member of the convention suggested even that the relator had been elected by the ballot that was taken at their commencement. All the twenty-two members who voted constantly for the relator during the whole session of the convention, were entirely silent on the subject. This shows conclusively that the members of the convention regarded the ballot that had been taken as merely informal—as of no conclusive effect—as a ballot of no importance whatsoever after any subsequent action of the convention of a contrary character. Why was the passage of the resolution appointing the defendant to the office so strenuously contested unless such had been the fact?

But it is said, that the demurrer in the case admits that the vote by ballot was formal, and that it elected the relator. I do not so understand the demurrer. The replication sets forth that the resolution annulling the vote by ballot on the ground of alleged errors therein, and the resolution electing the defendant to the office, were passed without any investigation by the convention to ascertain whether there

were errors in the ballot or not, when in fact there were none. These are the only allegations of fact in the replication. The rest is made up of claimed conclusions of law arising on the record of the proceedings of the convention. The demurrer admits the truth of these allegations of fact, but the record of the convention must speak for itself, and determine, as a matter of law in connection with these allegations of fact, who was elected prosecuting attorney.

There was no necessity for passing any resolution annulling the vote by ballot. Any act of the convention of a contrary character would have destroyed it, if parliamentary usage had required its destruction. It was doubtless done out of abundant caution to have the proceedings of the convention free from all appearance of irregularity.

I think, therefore, that the record of the convention shows conclusively that the vote by ballot was informal in character, and was so regarded by every member of the convention when it was taken, and that consequently it was not of a character to elect the relator to the office of prosecuting attorney.

But it is said by the majority of the court that the members of the convention may have considered that the passage of a resolution, declaring the relator elected, was necessary in addition to the ballot in order to complete his election; and then they go on to hold that the passage of such resolution was not necessary in fact.

If the members of the convention so believed when they cast their ballots, where lies the difference between a ballot so taken and an informal one? Under such belief every member of the convention might have cast complimentary ballots for the relator without any intention of electing him, but on the contrary with an intention of defeating his election by refusing to pass the necessary resolution. Every member of the convention knew that a vote by ballot was not necessary; that the passage of a resolution declaring a person elected was sufficient, in and of itself, to make an election; for the passage of the resolution declaring the defendant elected was strenuously opposed by every friend

of the relator, though no ballot electing him had been had. They knew the importance of the resolution. They knew that if it passed the defendant would be elected without anything further to be done. And furthermore, all the members of the convention were presumed to know the law,—were presumed to know that any mode of election in this case was sufficient in itself to make a legal election. Wherein then lies the difference between an informal ballot and the one regarded as formal by the majority of the court? In each the voters believe, and act upon the belief, that there will be nothing decisive, nothing final, in the vote they are casting; that, at the most, it will be merely an expression of the views of the convention in regard to candidates. This is all there ever is in an informal ballot; this is all there could be, it seems to me, in the ballot as it is regarded by the majority of the court.

Again, the majority of the court construe the vote “to proceed to ballot for prosecuting attorney” as a vote “determining the mode by which the appointment should be made,” and that only. If the mover of that resolution had simply this object in view when he made the motion, he was very unfortunate, it seems to me, in the use of language. The word “ballot” does not seem to be an important word in the vote, while the word “proceed” is. One would infer from the language that there had been delay in commencing the proceedings and so a member moved “to proceed,” &c. If he had intended to bind the convention to make the election by ballot, it seems to me he would have said, “I move that the election of prosecuting attorney be made by ballot,” without any reference to the time when voting should commence. But “proceed to ballot” means, simply, commence to ballot, begin to ballot.

Moreover, it seems clear to me that the convention put no such construction upon the vote they were passing. When the resolution declaring the defendant elected was under consideration by the convention, not a member suggested that it was out of order, that it could not be entertained, that the convention had bound itself to make the

election by ballot, and that too where, seemingly, every motion that ingenuity could suggest to defeat its passage was eagerly resorted to by the friends of the relator to accomplish that result. Is it possible that an objection, so obvious, and withal so manifestly fatal to the passage of the resolution, especially so soon after the convention had otherwise declared, would not have been made, if the members of the convention had understood that they had so bound themselves? I think not.

But suppose the vote by ballot was sufficient, in and of itself, to elect the relator, had not the convention the lawful right to reconsider its action, and elect the defendant during its continuous session on the matter?

The convention had one day, at least, in which to make an election; is it so that the convention unconsciously exhausted its power by a single vote early in its session on that day, so that if every member of the convention had, upon further consideration, desired to reverse its action while the convention still remained in session, and apparently had jurisdiction over the subject matter, it could not have been done? Is hasty and inconsiderate action of this character beyond recall, when all other business a convention may be called to transact may be reconsidered again and again, and changed at pleasure, while the convention remains in session? If this be so it must be conceded that the convention did not know it; for it continued to vote on the subject of the election of prosecuting attorney as long as its session continued, paying no heed to the ballot that had been taken. No good reason can be shown why this should be so, but many good reasons can be given why it should not be. Conventions and all other bodies of men who are intrusted with the election of public officers, should be encouraged to consider well the business they transact.

But this precise question has been before the courts of last resort in three different states of the Union, and each court has fully decided the question, it seems to me, in accordance with the views here expressed. The leading

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case on the subject is that of *State ex rel. Miller v. Foster*, 2 Halsted, 101. This was an information in the nature of a writ of *quo warranto*, charging that Foster had usurped the office of clerk of Gloucester County. The facts as gathered from the pleadings were as follows, and are remarkably like those of the case at bar. The power to elect to the office was vested in the Legislative Council and General Assembly in joint convention. The convention duly met for the purpose of election. The total number of members of the Council and Assembly was fifty-six, but only fifty-five were present. A majority of *those present* only was required to effect a valid election,—in this case twenty-eight. On the first ballot no person received a majority. On the second ballot the relator, Miller, had twenty-eight votes, and the defendant, Foster, twenty-seven, but the chairman, under the erroneous impression that a majority of the whole number of members, present and absent, was needed, declared that there was no election, and a third ballot was taken, the relator again receiving a majority (twenty-eight) of those present, the defendant having twenty-seven. During the taking of the fourth ballot a member raised the point that Miller had been duly elected, but the convention supported the erroneous ruling, and the vote proceeded, resulting in thirty-one for Foster and twenty-four for Miller, and Foster was declared elected, and the convention was thereupon dissolved. Foster received his commission and entered upon the duties of the office, and a *quo warranto* information was brought, at the relation of Miller, to oust him. The pleadings in the case were the information, answer, rejoinder and demurrer to the rejoinder, as in the case at bar.

The Attorney General for the relator contended that “when a majority of votes had been cast for a candidate the power of the joint meeting as to the appointment was at an end. The officer became absolutely entitled to the office, and was not removable by the joint meeting.” It will be noticed that the argument was the same as made in the present case. The court interrupted the defendant’s

argument, and said :—"Our minds are made up upon a point which we suppose will conclude the question before the court, which is, that all deliberative assemblies, during their session, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done. In this case so long as the joint meeting was in session they had a right to reconsider any question which had been before them or any vote which they had taken. In this view of the subject we are inclined to believe that there was nothing illegal or unconstitutional in the proceedings, and that the information cannot be sustained."

It is said, that this case was not well considered, and should not be regarded as authority. Still the Supreme Judicial Court of Massachusetts, in the case of *Baker v. Cushman*, 127 Mass., 105, cite this case not only approvingly, but as authority for the doctrine held in that case.

The next case in order is that of *Conger v. Gilmer*, 32 Cal., 75. The suit was an information in the nature of a writ of *quo warranto* to determine the title to the office of justice of the peace. The facts were as follows :—The office being vacant the board of supervisors met to make an appointment. On the eighth ballot Conger received a majority and was declared elected. Subsequently a resolution was offered that the appointment of Conger be reconsidered and set aside, which was adopted, and the board then appointed Gilmer, who entered upon the duties of the office, from which Conger, as relator, endeavored to oust him. The relator was successful in the court below, but the defendant brought the case to the Supreme Court, which reversed the decision of the lower court, dismissed the information, and sustained the defendant. I quote from the opinion :

"The only question involved in the case is whether the board of supervisors had the power which they exercised or attempted to exercise, to reconsider and set aside their previous action in relation to the appointment of the relator and direct the clerk not to issue his commission. If they

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had, their subsequent appointment of the defendant is valid. Whether they had or not depends upon the nature of the power which is vested in them to fill vacancies—whether the power is that of appointment or election as contra-distinguished from each other. * * * The words ‘appointment’ and ‘election’ represent different terms. The people elect; the governor or other functionary appoints. * * * The fact that boards of supervisors, when they exercise the appointing power, do so by first taking a vote, does not affect the character of the power. * * * The board acts by majorities, and in all cases the sense of the board has therefore usually to be ascertained by taking a vote. The will of the board can be ascertained in no other way, and the vote serves that purpose only, and does not convert the power exercised by them from that of ‘appointment’ to that of ‘election.’ * * * The power being that of appointment, the next question is, when is the appointment complete? * * * Has it been made when the president of the board has announced the result of the ballot? * * * Until the last act has been performed the whole matter is in fieri, and within the control of the person or persons by whom the appointment is to be made, and there is nothing to prevent them from changing their minds and appointing some other person than the one first elected. * * * It results that the board had power to rescind their first action at the time they did so, and further, that the subsequent appointment of the defendant was valid.”

It will be seen that this case is strikingly analogous to ‘the case under consideration.

But it is said that this case is as much an authority for the relator as for the defendant, for it virtually holds, it is said, that when the last act constituting an appointment to office has been done, the power of the appointing body over the subject becomes exhausted; and by the law of California the last act is performed when the certificate of appointment is signed and sealed by the officers of the appointing body, and not before. Until such time has arrived, it is conceded that the appointing power may pay no heed to

the votes it may have passed on the subject. But the question in the case before us is, when was the last act constituting an election or appointment done? The convention had an entire day in which to make an election or appointment. If the whole day was consumed in deliberation and voting on the subject, was the last act constituting an election or appointment done when a ballot was taken early in the session on that day, resulting in a majority for the relator? or was it done when the convention by its dissolution unequivocally showed itself satisfied with its last act in the matter?

In the California case, if a certificate had been given to Conger when he received a majority of votes on the eighth ballot, no one would have questioned his appointment. So here, if the convention had dissolved when the ballot was taken resulting in a majority for the relator, no one would have questioned his election, if the ballot had been of a character to elect.

In the California case the board had the right to deliberate and change so long as they postponed giving the certificate. In this case the convention had the same right so long as they continued to deliberate on the subject and refused to dissolve. In the California case, when the board ceased to deliberate and gave the certificate, they were satisfied with the last act they had done. So was the convention here, when they ceased to deliberate and voted to dissolve. There is no difference in principle between the two cases.

The next and last case to be found on the subject is that of *Baker v. Cushman*, 127 Mass., 105. This was a petition for a mandamus, with regard to the office of city clerk in the city of Taunton. The facts were as follows:—On January 6th, 1879, the eight aldermen and twenty-three councilmen of the city met in joint convention to elect a city clerk and other city officers. On the first ballot for city clerk, thirty-one members being present, thirty-two votes were cast, the petitioner receiving seventeen, the respondent fourteen, and Laurens Francis one. The election was de-

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clared void, and on a second ballot thirty-one votes were cast, of which the respondent had seventeen and the petitioner fourteen, and the respondent was declared duly elected, and the convention adjourned sine die. The court (GRAY, C. J.,) said :—"Whether we look to the record only, or to the facts found by the judge before whom this petition was heard, it does not appear that there was a complete election of the petitioner to the office of city clerk; but it does appear that the vote by which he appeared to be elected was immediately declared void, and the convention at once proceeded to another vote, in which all the members took part, resulting in the election of the respondent, and he was accordingly declared to be elected. It was within the lawful power of the convention, at the same meeting, and before the result of the election had been declared, to treat the proceedings already had as irregular and invalid, and to vote anew. The petitioner, therefore, acquired no right to the office. *State v. Foster*, 2 Halsted, 101. As this view is decisive of the case it is unnecessary to consider the other objections to the issue of a writ of mandamus."

This case is another strikingly like the one in question. But it is said, by the majority of the court, that the first vote taken was tainted with fraud or error, inasmuch as there was one ballot more cast than there were voters, and the convention, therefore, had the right to consider the ballot void, and to so declare. It does not appear whether the extra ballot was cast in fraud or by mistake, but whichever way cast, it did not and could not change the result. The petitioner had at least sixteen honest and valid votes to fourteen for the respondent, and one scattering. Why was he not elected? Is it so that the sixteen honest voters must be deprived of their choice simply because there was one dishonest or careless voter? On the same principle, if in a given case there were one thousand ballots cast—eight hundred of them for *A B* and two hundred of them for *C D*—the eight hundred would be deprived of their choice if it should be found that there was one more ballot cast than there were voters to cast them. Can this be so?

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McCrary (on Elections, sec. 444), says:—"It is not a valid objection to an election that illegal votes were received if they did not change the majority." See also *Trustees v. Gibbs*, 2 Cush., 39. And furthermore, if the convention in this case had the right to declare the ballot that had been first taken void simply because there was fraud or mistake to the extent of one vote, how much more in the case under consideration had the convention the right to set the ballot aside on the ground that the members cast their ballots believing that the vote would not be final, but that a resolution in addition to the vote would be necessary to be passed declaring the person elected who should receive a majority of the ballots before an election would be made, as a majority of the court say may have been the case. A mistake of this character was not the mistake alluded to in the resolution that was passed, and in the rejoinder to which the demurrer applied. That mistake had reference to certain members voting by mistake for the relator when they intended to vote for the defendant. But the court in *Massachusetts* put the case upon no such ground. The point is not even suggested in the opinion.

I think therefore that, even if the relator would have been elected by the ballot that was taken if nothing more had occurred, the convention had the right to nullify the ballot and elect the defendant.

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SUPREME COURT OF ERRORS,

HELD AT NORWICH, FOR THE COUNTY OF NEW LONDON,

ON THE FOURTH TUESDAY OF MAY, 1885.

Present,

PARK, C. J., CARPENTER, LOOMIS, GRANGER AND HOVEY,* Js.

FRANCIS BARTLETT, TRUSTEE, vs. WILLIAM A. SLATER
AND ANOTHER, EXECUTORS.

A testator by his will gave one million dollars to *B*, his son-in-law, in trust "to pay the income therefrom, or such portion thereof as he may think best, and at such times as he sees fit, to my granddaughter *C. B.* during her life." The granddaughter was the daughter of *B*, and an infant. The will further provided that the bequest should be payable to *B* within one year from the testator's death at the convenience of the executors, who were authorized to pay it in stocks or bonds belonging to the estate at their cash value, or in cash, as might be preferred. Held that the bequest did not carry interest until the end of a year from the testator's death.

The gift of the income from the money was not a gift of an annuity.

[Argued May 26th—decided August 28th, 1885.]

AMICABLE SUBMISSION to the Superior Court upon the following agreed statement of facts:

On January 10th, 1884, John F. Slater, of Norwich, duly executed the following will:

"I, John F. Slater, of Norwich, Connecticut, being of sound and disposing mind and memory, do make and de-

* Judge HOVEY of the Superior Court sat in the place of Judge PARDEE, who was absent on account of illness.

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clare this to be my last will and testament, hereby revoking all wills by me heretofore made.

“*First.* I direct that my just debts and funeral expenses be paid by my executors out of my estate.

“*Second.* I give and bequeath to my son-in-law, Francis Bartlett, of Boston, Massachusetts, two hundred thousand dollars.

“*Third.* I give and bequeath to said Francis Bartlett the further sum of ten hundred thousand dollars, in trust however, to hold, sell, invest and re-invest the same at public or private sale, from time to time, in such manner as he may deem prudent, and to pay the income arising therefrom, or such portion thereof as he may consider best, and at such times as he sees fit, to my granddaughter, Caroline Bartlett, during her natural life. Any portion of said income which shall not be so paid over to her by said trustee shall be invested by him and form part of said trust estate, with like power as to investments, sale and re-investment. The power hereby given to my said son-in-law as trustee to pay over the income of said trust fund to my said granddaughter at such times and in such amounts as he shall deem wise, is not given to any other trustee under this will; but any such other trustee shall pay over the whole income of said trust fund to my said granddaughter Caroline during her life, quarterly, and not by way of anticipation, taking her sole and separate receipt therefor, whether under coverture or otherwise. Upon the decease of my said granddaughter, if she shall survive me, leaving issue, otherwise upon my death, if my said granddaughter shall leave issue surviving me, then to pay over and distribute said trust fund and any undistributed income thereof to and among or in trust for such issue of my deceased granddaughter, in pursuance of the terms of any instrument in the nature of a will executed by such deceased granddaughter, according to the laws of this state, or, in the absence of such instrument executed by her, then to pay over and distribute the same equally among such issue. If my said granddaughter shall die before me, leaving no issue

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surviving me, or shall survive me and die leaving no issue surviving her, then upon the happening of either contingency, three hundred thousand dollars of said trust fund shall be paid to said Francis Bartlett, as and for his own estate, and the remainder of said trust fund, principal and interest, shall be paid over and distributed by said trustee to my heirs at law.

“*Fourth.* In case of the death, resignation or inability of the said Francis Bartlett to act as such trustee, I authorize and empower the court of probate for the district of Norwich to appoint some suitable person or persons trustees to execute said trust.

“*Fifth.* The legacies aforesaid are to be paid within one year from my decease, at the convenience of my executors, and said executors are authorized to pay the same in stocks or bonds belonging to my estate at their cash value, or in cash, as may be preferred.

“*Sixth.* I give, devise and bequeath to my son, William A. Slater, all the residue of my estate, real and personal, to him and his heirs forever.

“*Seventh.* I hereby constitute and appoint said William A. Slater and Alfred A. Young executors of this my last will and testament, and I desire that no bonds shall be required of them. I also desire and direct that said Francis Bartlett shall be exempt from giving bonds as trustee under this will, but this exemption is not to apply to any other trustee.

JOHN F. SLATER. [L. S.]”

John F. Slater died on May 7th, 1884, leaving a large estate, real and personal, and his will has been duly probated, and the executors therein named have accepted the trusts, been duly qualified, and have proceeded to settle the estate according to law. Francis Bartlett, named in the will as trustee to hold and manage the estate therein bequeathed in trust, has accepted the trust, and duly qualified.

The testator, at the time of the execution of the will, was of the age of sixty-eight years and ten months, and Caroline Bartlett, the granddaughter, was, at that time, of the age of thirteen years and eight months. Mr. Bartlett was,

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at the time of the execution of the will, and ever since has been, of sufficient ability to provide for the proper support and education of said Caroline.

The personal estate of the testator, consisting among other assets of the bonds and stocks drawing interest or income referred to in the will, after the payment of all debts and the other legacies therein bequeathed, exceeded the amount of the bequest of ten hundred thousand dollars to said Bartlett in trust.

The sum of ten hundred thousand dollars bequeathed to Mr. Bartlett in trust, has, to a considerable extent, been paid over by the executors to the trustee.

Mr. Bartlett, as trustee under the will, claims that the trust fund is entitled to interest from the death of the testator to the time of its payment, and has demanded payment of the same. The executors claim that the trust fund is not entitled to interest from the death of the testator, but only from one year after his death, and have refused to pay the same.

The Superior Court reserved the case for the advice of this court.

F. Bartlett, pro se.

J. Halsey and W. A. Briscoe, for the defendants.

PARK, C. J. The will of John F. Slater bequeathed the sum of one million dollars to his son-in-law, Francis Bartlett, the plaintiff in this suit, in trust to pay the income arising therefrom, or such portion thereof as he, the trustee, might consider best, to the testator's granddaughter, the daughter of Mr. Bartlett, during her natural life.

In another clause of the will this bequest is made payable to the trustee, by the executors of the will, within one year after the death of the testator, at the convenience of the executors, and they are authorized to pay it in stocks or bonds belonging to the estate at their cash value, or in cash. as might be preferred.

The sole question in the case is, whether the trustee is entitled to interest on this bequest from the death of the testator, or from the end of one year thereafter.

The general rule on the subject is thus stated in Williams on Executors:—"When no time of payment of the legacy is fixed by the will, the executor is allowed one year from the death of the testator to ascertain and settle his affairs; at the end of which time the court, for the sake of general convenience, presumes the personal estate to have been reduced to possession. Upon that ground interest is payable from that time, unless some other period is fixed by the will. Nor will interest be payable from an earlier date though there is a direction in the will to pay the legacy as soon as possible." 2 Williams on Exrs., 1424. See also 2 Redfield on Wills, 465, 471; 1 Swift's Digest, 455.

There are some exceptions to this general rule. One is, where a legacy is given in satisfaction of a debt. Another is, where a legacy is given to the testator's minor child, or to one to whom the testator is *in loco parentis*, and there is no other provision for the maintenance of the legatee. Another is, where the legacy is an annuity; and still another, where the bequest is of the residue of the testator's estate, or of some aliquot part thereof, in trust to pay the interest or income to the legatee for life with remainder over at his death.

In all these cases the rule is to allow interest from the death of the testator. But no one of these exceptions to the general rule applies to the case under consideration. It is claimed, however, that the legacy, being given to a third person to pay the income to the beneficiary during her natural life, is in the nature of an annuity, and that so the rule in relation to annuities should apply.

The language of the bequest is as follows:—"To pay the income arising therefrom, or such parts thereof as he [the trustee] may consider best, and at such times as he sees fit, to my granddaughter during her natural life." This bequest grants discretionary power to the trustee to pay to the beneficiary such portion of the income as he may consider

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best. He may pay over the whole, or any portion thereof, or none at all, according to his discretion. The time of payment, too, is left wholly to the discretion of the trustee. The bequest has but few of the elements of an annuity, which is "a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, charging the person of the grantor only." 2 Williams on Exrs., 809.

In the case of *Booth v. Ammerman*, 4 Bradford, 129, the court says:—"The income or interest of a certain fund is not an annuity, but simply profits to be earned, and, although directed to be paid annually, that relates only to the mode of payment, and does not change the character of the bequest. In such a case it does not become the duty of the executor to invest the principal fund until the end of a year, and the interest does not become payable until the end of the second year." Redfield (on Wills, vol. 3, 186,) says:—"In the case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but when the interest or net income of a certain sum is given, it will not begin to run till the end of the first year from the death of the testator, and the first payment consequently becomes due in two years from that date."

Lord ELDON, in *Gibson v. Batt*, 7 Ves., 96, drew the distinction between an annuity and a legacy for life, which has been cited in every thoroughly considered case since. He says:—"If an annuity is given, the first payment is payable at the end of the year from the death; but if a legacy is given for life, with the remainder over, no interest is due till the end of two years. It is only the interest of the legacy; and till the legacy is payable there is no fund to produce interest."

We think it is clear that the legacy in question cannot be regarded as an annuity.

The trustee further claims that the clause in the will which declares that "the legacies as aforesaid are to be paid within one year from my decease, at the convenience

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of my executors, and said executors are authorized to pay the same in stocks and bonds belonging to my estate at their cash value or in cash as may be preferred," shows that the testator intended that the legacy in question should be paid at some period or periods during the year, and not after the expiration of the year. He thus presents the point in his brief:—"The period of payment within the year was to be governed by the convenience of the executors, and, as bearing upon that convenience, payment in the bonds and stocks of the testator was distinctly authorized. The case as submitted shows that, after payment of all debts and other legacies, there existed in the hands of the executors interest-bearing and dividend-paying bonds and stocks largely in excess of the sums necessary to create the trust fund. Can it be said that the testator intended that the interest and income of these stocks and bonds should be retained by the executors and added to the *corpus* of the estate until the last day within the year after his death, and then that the fund should be paid to the trustees in those stocks and bonds or in cash? We submit that, fairly construed, it indicates an intent that the *cestui que trust* should enjoy the interest and income of the trust fund before the expiration of the year."

Still the will expressly gave the executors one year after the death of the testator in which to pay the legacy to the trustee. Payment on the last day or last hour of the year would be within the will. That payment may be made at the convenience of the executors can make no difference. They were to be the judges of their convenience. Whenever they should make payment within the year, it would be presumed that then was the convenient time for payment. They were only restricted to the year. But the will declares that payment may be made in bonds and stocks at their cash value at the time payment shall be made within the year. The bonds were interest-paying bonds, and the stocks were dividend-paying stocks. The cash value of such bonds and stocks, at any particular time, is made up of their value as representing principal or

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capital and the accruing interest or dividend. The value thus varies with the nearness or remoteness of the time when the next dividend will be declared or the next interest become payable. But the will takes no notice of this enhancement of value. The payment of one million dollars may be made in their cash value at the time of such payment; no more and no less. And if payment shall be made in cash on the last day of the year after the death of the testator, the payment shall be of the sum of one million dollars; no more and no less. The will declares that such payment in either mode shall be full payment of the bequest. How then can interest be claimed by the terms of the will?

This would seem to be a full and complete answer to the further claim of the trustee, that a proper construction of the bequest in question shows it to be a bequest for the maintenance of the granddaughter of the testator, and that so the bequest carries interest from the death of the testator, not by presumption of law, but by the will itself.

The answer is, that if the trustee is right in his claim, that the will itself shows the bequest to be given for the maintenance of the granddaughter, still the will itself declares that the payment of one million dollars in cash, or in stocks and bonds at their cash value, at any time within one year from the death of the testator, shall be full payment of the bequest; not full payment of the principal sum, leaving the interest unpaid, but full payment, principal and interest, if there could be any interest. Surely the testator had the right to say how large the bequest should be which he left for the maintenance of his granddaughter, if the trustee is correct in his construction of the will.

But is he correct in that construction? He bases his claim upon the word "best" in the bequest. He presents the point thus:—"The will provides, whether the ability of the father to furnish maintenance for his daughter should exist or not, that some part of the income shall, during the infancy of the daughter, as well as afterwards, be paid to that daughter. It is to be such portion as that father shall

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consider best. Best for whom? Not best for the trustee, to diminish his own natural liability, but best for the infant. What else could be best for such infant but education and maintenance?" But many other things might be best. It might be best to withhold rather than to pay. Manifestly, the great concern of the testator, in bequeathing this very large sum of money, the interest of which would be sixty thousand dollars per year, was the welfare of his young granddaughter, who was just entering into womanhood. There was greatly more danger that her father, the trustee, would pay her too much of this vast income during her minority than that he would pay her too little; and during such time it seems to be clear that the word "best," as used by the testator, had more reference to withholding the income than to paying it. The plain meaning is,—pay her only what you think best. We think the trustee's construction of the bequest is not correct.

We therefore advise the Superior Court that the plaintiff is not entitled to interest till the end of one year from the death of the testator.

In this opinion the other judges concurred.

**THEOPHILUS BROWN vs. ORRIN S. EGGLESTON AND
ANOTHER, ADMINISTRATORS.**

The act of 1882 (Session Laws 1882, p. 146), provides that whenever any person shall have a legal claim against any executor, administrator, guardian or trustee, for moneys paid or services rendered for the estate in the hands of such executor, &c., which ought equitably to be paid from such estate, the amount may be recovered in an action against such executor, &c., the judgment to be paid wholly out of such estate. Certain expenses were incurred by the plaintiff in a contest over two wills of a decedent that were presented for probate, both of which were disallowed, and administrators appointed on the estate. Held that the expenses thus incurred did not constitute a legal claim against the estate and therefore did not fall within the statute.

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And held that it made no difference that the expenses were incurred at the request of a person who was afterwards appointed one of the administrators, and who after appointment promised to pay them.

And that it would have made no difference if the request had been made after the appointment, as the estate would not be liable under the statute unless the expenses were incurred for the estate and were such as ought equitably to be paid out of the estate.

The only remedy in that case would have been against the administrator at whose request the expenses had been incurred, who would be personally liable on general principles.

The statute was not intended to affect the relation of an executor or administrator to the party rendering services or paying money for the estate, but only to give the latter a right of action against the estate as a cumulative remedy.

Expenses incurred by an administrator before his appointment can be allowed by the probate court, where they are reasonable and have been incurred in behalf of the estate.

Whether the term "guardian" in the statute should not be construed as including conservators: *Quære*.

A conservator acts independently of his ward, and in all his transactions is alone the responsible party. Neither a conservator nor a guardian can bind the ward or his estate by his contracts.

But a conservator is not liable for debts incurred by the ward before his appointment. Such claims remain claims against the ward alone.

A judge of probate has no power to direct that money in the hands of a third party due to a ward shall be paid to the conservator to satisfy a balance due the conservator. Such a direction is not a judicial order, and would be invalid as not within the jurisdiction of the court.

Where a claim was made by the representatives of a deceased ward against the person making the payment to the conservator under such an order, it was held that the payment would be a good accounting for so much of the money in his hands, if the amount was really due the conservator from the estate of the ward.

[Argued May 26th—decided September 5th, 1885.]

ACTION for moneys expended and services rendered, brought by appeal from the judgment of a justice of the peace to the Court of Common Pleas. The complaint contained two counts, one for moneys expended and services rendered for Sabrina Main, of whose estate the defendants were administrators, in her life time, and the other for moneys expended and services rendered for the defendants as administrators of her estate. The defendants pleaded the general issue and a set-off. The case was tried to the court before *Mather, J.*, and the following facts found:—

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Asa L. Gallup was on the 23d of October, 1878, appointed conservator of Sabrina Main, the intestate, and accepted the trust. She died on the 8th of September, 1881, and the defendants were appointed administrators of her estate. The probate court limited six months for the presentation of claims by creditors of the estate, within which time the plaintiff presented his claim, but Gallup presented no claim. A part of the plaintiff's claim was for services rendered and expenses incurred in the appointment of one Noyes as conservator of the said Sabrina, previous to the appointment of Gallup; a part for like services and expenses in the appointment of Gallup as conservator; a part for services rendered and moneys paid for the benefit of said Sabrina or her estate at the request of Gallup as her conservator; and a part for services rendered and expenses incurred, at the request of Alura J. Crandall, one of the defendants, in the hearing before the probate court with regard to the probate of two claimed wills of the said Sabrina; for which services and expenses it was agreed by said Crandall as administratrix that a reasonable sum should be paid.

The probate court, on September 27th, 1881, after the death of said Sabrina, allowed the account of Gallup as her conservator, showing a balance due him from her estate of \$34.56; and on the 26th of October, 1881, the judge of the probate court directed the plaintiff to pay that sum to Gallup out of funds of the estate in his hands, and he paid him that sum accordingly. This sum was one of the items which the plaintiff claimed to recover in the present action.

After the death of the said Sabrina and before the appointment of the defendants as administrators, the plaintiff collected \$105 due the estate for rent under a lease made by Gallup as her conservator in her lifetime.

The court allowed most of the items of the plaintiff's account, including the above \$34.56, charged him the \$105 rent received, and found a balance due him of \$33.62, for which amount and costs judgment was rendered in his favor. The defendants appealed.

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A. B. Crafts, for the appellants.

1. The first count is for an indebtedness contracted by Sabrina Main personally in her lifetime. Of the services and expenses charged those pertaining to the appointment of the successive conservators over her were not rendered or paid at her request, and so created no personal liability on her part. *Clowes v. Van Antwerp*, 4 Barb., 416. For the services and expenses after the conservator was appointed, rendered and paid out at his request, he alone, and not she or her estate, is liable. *Campbell v. Crandall*, 2 Root, 371; *Taylor v. Mygatt*, 26 Cohn., 184; *Burke v. Terry*, 28 id., 414; *Thacher v. Dinsmore*, 5 Mass., 299; *Forster v. Fuller*, 6 id., 58; *Jones v. Brewer*, 1 Pick., 317; *Wallis v. Bardwell*, 126 Mass., 366.

2. The second count alleges an indebtedness contracted by the administrators for the benefit of the estate. But for services rendered or money paid at the request of the administrators they are liable personally and not as administrators, and no suit can be maintained against them in their representative capacity except under the statute of 1881 (acts of 1881, ch. 51), which applies only to the case of services rendered and moneys paid "for the estate" and which "should justly be paid out of such estate." Here the services rendered were in the unsuccessful attempt to establish a certain document as the will of the intestate. Such services are not rendered the estate, and cannot be recovered of the administrators, and do not fall within the statute. *Leavenworth v. Marshall*, 19 Conn., 417. If the services were rendered at the request of Alura Crandall, and if she afterwards promised to pay for them, she may be personally responsible, but nobody else.

3. The balance due Gallup as conservator, \$34.56, was a claim on his part against the estate; but it should have been presented by him against the estate within the time limited, and not having been so presented is barred. *Norton v. Strong*, 1 Conn., 65. It was of no use for the plaintiff to present it as a part of his claim. He had no right to pay

the amount to Gallup and then treat it as a claim of his own, unless as assignee of it, and he does not sue as such.

4. The defendants are entitled to recover the sum of \$105 which was collected by the plaintiff after the death of the intestate from rents due the estate. *Sanford v. Hayes*, 19 Conn., 591; Gen. Statutes, p. 848, sec. 9.

A. C. Lippitt, for the appellee.

The material questions in this case are:—(1.) Whether the several items in the plaintiff's bill of particulars not settled in the lifetime of Sabrina Main, and those charges against her estate, subsequent to her decease, to the amount found by the court, are proper charges against her estate. (2.) If proper charges, whether the plaintiff has been paid.

1. Sabrina Main was put under the charge of Noyes as conservator September 1st, 1877, and October 23d, 1878, under the charge of Gallup as conservator. Gallup continued in this position until her death, September 8th, 1881. The court finds that his account was settled during her lifetime, except certain items of which a part were for expenses incurred previous to the appointment of Gallup and have not been paid. These are charges against the estate; they certainly are not against the conservator. *Norton v. Strong*, 1 Conn., 70, 71. A conservator's duties are to manage the affairs and estate of his ward during the life of his ward. He is but the agent of the law.

2. The rest of the items in the plaintiff's bill of particulars to September, 1881, were services rendered and money paid for the benefit of said Sabrina or her estate by the plaintiff, at the request of her conservator, Gallup. None of these items could, in any way, be construed to be a debt of the conservator. They might be paid by him out of the funds in his hands belonging to her estate, and they were in fact paid and discharged—settled. The items from September 19th to 26th, 1881, were for services rendered and money paid for the benefit of her estate.

3. The item of \$34.56 was money paid October 26th, 1881, by the plaintiff to the conservator to balance his account, by

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direction of the judge of probate, out of moneys in his hands, to wit, \$105, rent collected. The court of probate had accepted and allowed the conservator's account, finding this balance in his favor. The plaintiff paid this balance to the conservator, out of funds of the estate in his hands, by order of the court. This left the conservator with no claim against the estate, and the plaintiff, having thus paid the conservator, had no claim on him.

4. At the same time, with the consent and at the request of Alura J. Crandall, one of the administrators on the estate, he paid the further sum of \$32 expense incurred by him at her request. The services were rendered in the probate court in connection with the estate of which she became administratrix. The agreement to pay was after her appointment and under her authority as administratrix. It would manifestly be a great hardship to require the executor or custodian of a will to present it to court under the penalty prescribed, and make him responsible, personally, for all costs and expenses in the event that it should not be accepted as the will of the testator. The law does not so require.

5. Sabrina Main died September 8th, 1881, and the defendants were appointed administrators October 25th, 1881. The plaintiff could not present his bill to the conservator, for his duties had ceased; the court of probate and administrators had succeeded. He presented his bill to the administrators in conformity with law. The court properly allowed the charges in his bill of particulars and the credit therein given. There is still due him, as found by the court, \$33.62.

CARPENTER, J. On one point in this case we are constrained to say that the court below erred. The action is against the administrators of an intestate estate, the complaint consisting of two counts, one for a debt incurred by the intestate during her lifetime, and one for a debt accruing after her decease. She died September 8th, 1881. After her death two instruments, each purporting to be her last will and testament, were presented to the court of

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probate. Both were contested and neither was approved as her last will. In the litigation concerning the proposed wills certain expenses were incurred by the plaintiff at the request of one of the defendants, and she, as administratrix, agreed that a reasonable sum should be paid therefor. The expenses thus incurred were allowed by the court below to the amount of \$88 and interest. The sum thus allowed, improperly as we think, amounts to more than the balance found due to the plaintiff; hence it cannot be remitted, but the whole judgment must be reversed.

This court held in *Taylor v. Mygatt*, 26 Conn., 184, that an administrator has no power to make the estate a debtor, even for expenses legitimately incurred in the settlement of the estate, but that such expenses are claims against the administrator personally. See also *Chambers v. Robbins*, 28 Conn., 544. To some extent this is now changed by statute. Session Laws of 1882, p. 146. That statute is as follows:—

“In all cases in which any person shall have a legal claim against any executor, administrator, guardian or trustee, growing out of moneys paid or services rendered for the estate in the hands of such executor, administrator, guardian or trustee, and which should justly be paid out of such estate, an action at law may be brought by such claimant against such executor, &c., and if such claim shall be found to be a just one, and one which ought equitably to be paid out of such estate, judgment may be rendered in favor of such claimant to be paid wholly out of the estate.”

Obviously this statute is not broad enough to cover this case. The claim must be against an executor or administrator, and must be a debt contracted by him in his representative capacity, and not a debt contracted by some other party before his appointment; and by the express terms of the statute it must be for moneys paid or services rendered for the estate in the hands of the executor, &c. If the title to the estate or any portion of it was in dispute, and expenses were incurred by the administrators in defending it, it might be truthfully said that such expenses were in-

curred for the estate, and they might well be recovered of the estate under this statute. But no one would presume to claim that expenses incurred in attacking the estate or its title should be paid from it. It does not appear whether the expenses allowed were incurred in endeavoring to establish the proposed wills or in resisting them. If the former, as they may have been, then they were incurred in a wrongful attempt to divert the estate from its legal course, and they should not have been allowed. If the latter, then they were incurred voluntarily, by parties interested in defeating the proposed wills, and before administration granted. Although such action may have been in the interest of the estate, yet the persons so acting had no power to bind the estate, because they were not legally authorized to represent it. The agreement of Alura J. Crandall, one of the defendants, that the expenses should be paid out of the estate, cannot bind the estate, because she had no power to make such an agreement; certainly not if the alleged agreement was made before her appointment. If made afterwards, even then the estate is not liable, unless it appears that the money paid or services rendered were for the estate, and "ought equitably to be paid out of the estate;" and there is no such finding in the case. But the expenses were evidently incurred before administration was granted.

The statute only contemplates expenses incurred by executors or administrators legally appointed and authorized to act as such, and cannot be made to apply to expenses previously incurred by interested parties. This is manifest from the further provision of the statute, that the creditor may at his election pursue his legal remedy against the executor or administrator personally. Of course nothing in this opinion is intended to prevent the court of probate from allowing to the administrators in their administration account any just and reasonable expenses incurred in behalf of the estate before administration. Upon the facts as they now appear, we think the plaintiff must seek his remedy in that direction, or against the administratrix personally.

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The first three items of the plaintiff's account accrued in the proceedings to appoint conservators. The court found that they were reasonable charges for services rendered and moneys paid out. No objection is made that the services rendered and moneys paid were not for the benefit of the ward, and while she was without a conservator; but the objection is that the charges should have been made against the conservator personally.

The charges being proper, it was doubtless the duty of the conservator to pay them from funds in his hands and charge the money so paid in his account; but that duty devolved on him as conservator and did not make him a debtor in his private capacity. When the right to charge matured there was no conservator. Of course the charge could only be made against Mrs. Main. The relation of debtor and creditor between her and the plaintiff was then fixed, and that relation was not disturbed or changed by the appointment of a conservator. Hence, if a suit was necessary, she was the proper party during her lifetime to make defendant, and after her death her administrators. A conservator cannot be made personally liable for existing debts. There may be some liability if he neglects or refuses to pay or provide for them, but that liability does not go to the extent of making him personally a debtor to the creditor. We discover no error in allowing these items.

A portion of the account allowed by the court below accrued while the intestate and her estate were subject to the control and management of a conservator. The defendant insisted that these items, if proper charges at all, could not be charged to the ward, but should have been charged to the conservator. The court ruled otherwise, and that ruling is assigned as a reason of appeal.

An executor or administrator, as we have seen, has no power to bind the estate he represents by contract, except as such power may be implied from the statute of 1882 above referred to. But that statute was not in force when the services were rendered for which those charges were made. Moreover, the statute was not intended to affect

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the personal liability of an executor or administrator; its principal object seems to have been to give the creditor a right to collect his debt from the estate as a cumulative remedy. So that, if the word "guardian" in the statute may be interpreted as including conservators, as perhaps it may, still the statute will not affect the question now before us.

It has been repeatedly decided in Massachusetts that a guardian has no power to bind the ward or his estate by his contract. *Thacher v. Dinsmore*, 5 Mass., 299; *Forster v. Fuller*, 6 id., 58; *Wallis v. Bardwell*, 126 id., 366.

Administrators and guardians in this respect are closely analogous to conservators. The powers and duties of a conservator are defined in a general way by statute. He "shall have the charge of the person and estate of such incapable person;" "the conservator shall manage all the estate of his ward, and apply the net income thereof, and, if necessary, any part of the personal estate, to support him and his family and to pay his debts, and may sue for and collect all debts due to him." The statute neither expressly nor impliedly authorizes the conservator to make contracts in the name of the ward, and the ward is legally incapable of making a contract. A conservator, unlike an overseer, acts independently of his ward, and in all his transactions he alone is the responsible party. He is not however bound to contract debts and pay them from his own estate. The law places in his hands ample means for supplying himself with funds to meet all his obligations. If he suffers loss personally it must be through his own neglect. Sabrina Main being in fact and in law incapable of making a contract when the services were rendered, it is difficult to conceive how she or her estate can be held liable *ex contractu*.

Again. The services performed by the plaintiff, if proper, should have been performed by the conservator. The finding shows that they were in fact performed at his request. Regularly he should have paid for them and charged the amount paid in his account. Upon the presumption that he did his duty we must presume that he did so, and that

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the amount paid was included in the balance found due him. As the record stands these items seem to have been erroneously allowed.

The fifth reason of appeal is, that the court should not have allowed the sum of \$34.56, paid by the plaintiff to the conservator October 26th, 1881. That sum was paid by direction of the judge of the probate court. There is no finding that the administrators, who were appointed the day before, requested the payment. The objection is that the claim was not presented to the administrators as a claim against the estate by Mr. Gallup, and that there was no assignment by him to the plaintiff, although the plaintiff duly presented the claim.

We do not understand that the judge of probate had any power to direct as to the disposition of the funds in the plaintiff's hands. It was a mere personal direction and not a judicial order. Even if the probate court had ordered it, the order would have been invalid, because it was a matter not within its jurisdiction. So far as we can see, the only way to relieve the transaction from being a gratuitous payment is to regard it as a purchase by the plaintiff. In that event he could only recover as an assignee and upon a complaint adapted to the facts. There is therefore a technical difficulty in allowing this item as a basis of recovery; but there was no difficulty in allowing it as a set-off to the demand against the plaintiff, if it appeared that Mr. Gallup was justly entitled to it, and that the estate was benefited to that amount. We think that the court might properly treat it as an equitable accounting for so much money. That it was allowed as a set-off only is apparent from the fact that the judgment was for a less sum than the amount erroneously allowed.

The judgment is reversed and a new trial ordered.

In this opinion the other judges concurred.

SUPREME COURT OF ERRORS,

HELD AT NEW HAVEN, FOR THE COUNTY OF
NEW HAVEN,

ON THE FIRST TUESDAY OF JUNE, 1885.

Present,

PARK, C. J., CARPENTER, LOOMIS, GRANGER AND
STODDARD, Js.*ROGERS & BROTHER *vs.* CEPHAS B. ROGERS AND OTHERS.

In 1858 two brothers named Rogers formed a copartnership for making silver-plated spoons, forks and knives, under the name of "Rogers & Brother," and in the following year a corporation was organized by them of the same name and for the same business, they being the principal stockholders. The firm and afterwards the corporation had adopted and used as a trade-mark, stamped upon the backs of the articles made, "*Rogers & Bro. A 1." In 1883 the defendants, a firm consisting of three partners of the name of Rogers, one of them being C. B. Rogers, under the name of "C. Rogers & Bros.," previously engaged in the making of other plated ware, entered upon the same manufacture and stamped upon their ware in the same way the following trade-mark, "C. Rogers & Bros. A 1." It was found that the word "Rogers" had for a long time been the conspicuous and valuable thing in various trade-marks used by different concerns upon such goods, and that the defendants in commencing the manufacture had in view the popularity in the market of plated goods bearing a stamp with that name, but that they used the stamp to designate their own manufacture and there was no intentional misrepresentation on their part. It also appeared that the mark "A 1" was in common use as a designation of the quality of goods. It was also found that the plaintiffs' goods bore a very high reputation in the market; also that the defendants' trade-mark would without difficulty be distinguished from the plain-

*Judge STODDARD of the Superior Court sat in the place of Judge PARDEE, absent on account of ill health.

58	121
54	506
53	121
09	719
53	121
72	653

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tiffs' by dealers in the articles, and by retail buyers who looked beyond the word "Rogers," but that retail buyers who regarded only that word would be liable to confound one with the other. In a suit for an injunction against the use by the defendants of the trade-mark "C. Rogers & Bros.," and also against the use of the word "Rogers" in any trade-mark upon such goods, it was held that an injunction ought not to be granted against either. (Two judges dissenting.)

A manufacturer has the right to use his own name as a mark upon his goods although it be the same name with that of another manufacturer of the same goods, who makes the name a part of his own trade-mark, where there is no false representation in such use; and the majority of the court regarded the absence of all fraudulent designs and acts as established by the finding of facts in the court below.

[Argued June 3d—decided August 21st, 1885.]

SUIT for an injunction against the use by the defendants of the plaintiffs' trade-mark, for an account, and for damages; brought to the Superior Court in New Haven County. The plaintiffs were a joint stock corporation by the name of "Rogers & Brother," and the defendants a copartnership by the name of "C. Rogers & Brothers." The case was heard before *Beardsley, J.*, and the following facts found:—

The plaintiff corporation is located at Waterbury, in this state. Ever since its organization, in December, 1859, it has been extensively engaged in the manufacture of silver-plated spoons, forks and knives, and its yearly sales of such goods have, during that time, increased from \$50,000 to \$500,000, and its goods have had and have a high reputation.

About the year 1847, three brothers, all now deceased, namely, William, Asa H. and Simeon S. Rogers, engaged in the manufacture of electro-silver-plated spoons, forks and knives, at Hartford, in this state, under the copartnership name of "Rogers Brothers." They were among the first in this country to apply the process of electro-plating to the manufacture of such ware. They were honest and skillful in their art and business, and by reason of these personal qualities, as well as the then novelty of the art of electro-plating, the goods made and sold by them under their copartnership name obtained a high reputation in the public market. The spoons, forks and knives manufactured

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by them were stamped thus: “*Rogers Brothers A 1,” or “*Rogers Bros. A 1;” and such stamps then became well known in the trade as indicating goods manufactured by that firm, and were stamped upon all their first quality goods, and acquired a trade value, and the goods became known and had a valuable reputation as the Rogers goods.

In 1853 the copartnership of Rogers Brothers was organized into a joint stock corporation, under the name of the Rogers Brothers Manufacturing Company, and the manufacture of electro-silver-plated spoons, forks and knives was carried on by the corporation at Hartford until about the year 1862; and during all that time the spoons, forks and knives so manufactured were stamped as the goods manufactured by the copartnership which preceded the corporation had been, and such stamps continued to be well known in the markets as indicating the goods manufactured at Hartford by the concern that had been originally established by the Rogers brothers, and the goods continued to have the valuable reputation before mentioned.

In 1856 Simeon S. Rogers, one of the brothers forming the original copartnership, but having no employment with the above-mentioned corporation, made some business connection with the Hartford Manufacturing Company, a corporation then engaged in a similar business with the Rogers Brothers Manufacturing Company in Hartford, and during such connection (which continued till 1858), spoons, forks and knives made by the Hartford Manufacturing Company were stamped “Rogers A 1,” without objection from either of the other brothers or the Rogers Brothers Manufacturing Company, and by such stamp the goods manufactured by the Hartford Manufacturing Company became well known in the public market. The latter company was engaged in this business before Simeon Rogers was connected with it, but did not then use any stamp which had the name Rogers in it; and after the connection of Simeon Rogers with it ceased, the corporation was in 1859, on application of the Rogers Brothers Manufacturing Company, enjoined against using any stamp with the word “Rogers” in it

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In 1856 or 1857 William Rogers, another of the brothers, being then the president of the Rogers Brothers Manufacturing Company, disconnected himself from that concern, and with others organized a new corporation in the same business, under the name of "Rogers, Smith & Co.," and the spoons, knives and forks manufactured by this corporation were sent into the market stamped "* ♡ Rogers & Co., A 1," or "* Rogers, Smith & Co., A 1," and these stamps continued to be so used, without objection from any one, until about the year 1862; and the goods so manufactured and stamped had a good reputation in the public market.

In 1858 these two corporations were consolidated, William Rogers becoming president of both, and their business was conducted as if one. The consolidation was confirmed by the General Assembly in 1862, during which year both corporations failed.

In 1858 Asa H. Rogers and Simeon S. Rogers, two of the brothers, formed a copartnership in Waterbury under the name of Rogers & Brother, and, under that name, engaged in the manufacture of electro-silver-plated ware. The partnership adopted and used in its business the stamp "* Rogers & Bro., A 1," and stamped the same upon the back of the shanks of all its first quality forks and spoons. The said Asa and Simeon were well aware that their name "Rogers," as a part of the stamps previously used, had already, by reason of its use in those connections, upon spoons, knives and forks as before mentioned, acquired a reputation of value in the public market, and they adopted, claiming the right so to do, their partnership name and said stamp in the expectation that they would thereby be able to avail themselves to some extent of the reputation existing in the market in connection with the manufactures of the Hartford concerns before mentioned, and in which they had been two of the three constituting the firm of "Rogers Brothers," and they prepared and circulated extensively among the trade a circular setting forth this fact.

They continued to carry on business as partners until

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December, 1859, when the plaintiff corporation was organized, and acquired by purchase all the property and business of the firm, including its stamp and good will, and has ever since used the stamp in its business, always stamping it upon all its first quality knives, forks and spoons, upon the back of the shank of the forks and spoons, and this use of the stamp by the plaintiffs was never objected to by any of the brothers. The said Asa H. and Simeon S. were associated with others in the formation of the corporation, and became stockholders and officers therein.

In 1862 William Rogers, Asa H. Rogers and Simeon S. Rogers, having then no connection with the plaintiff company, formed, and for some time thereafter continued a business connection with the Meriden Britannia Company, a corporation located at Meriden, under certain contracts, by virtue of which the Britannia Company claimed the right, and thereupon commenced, to stamp spoons, forks and knives of its manufacture with the stamp "1847, Rogers Bros. A 1," and issued to the trade circulars, recommending their goods so stamped, and it has ever since claimed the right to so stamp such articles of its manufacture, and, under such claim, it has put upon the market a very large amount of goods so stamped, and such goods have had a good reputation in the public markets. At the time this connection was formed by the three Rogers brothers with the Meriden Britannia Company there was no other company, except the plaintiff, doing a similar business, and using a stamp which had the word "Rogers" in it.

In the year 1865 the Meriden Britannia Company obtained, by arrangement with the plaintiff corporation, a controlling interest in its stock, and the plaintiff corporation became also interested in the stock of the Meriden Britannia Company, and this arrangement has ever since continued between them. The motive of this arrangement was to avoid litigation respecting the Rogers name, and to provide for its use in common by the two concerns.

In 1865 William Rogers left the employment of the Meri-

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den Britannia Company, and a copartnership was formed in Hartford under the name of "The William Rogers Manufacturing Company," for the purpose of manufacturing electro-silver-plated spoons, forks and knives, with which copartnership he remained connected until he returned to the Meriden Britannia Company in 1868, under a further contract. This company adopted and used the stamps "† Wm. Rogers & Son, A A," and "1865, Wm. Rogers Mfg. Co. A A."

In 1872 a joint stock corporation was formed, under the same name, to succeed the copartnership of the William Rogers Manufacturing Company, and to carry on the same business, and this corporation has ever since carried on such manufacture extensively, the plaintiff corporation and the Meriden Britannia Company having had for several years a half interest therein; and it continued and still continues to use said stamps.

During the period of manufacture by the copartnership and corporation of the William Rogers Manufacturing Company, the goods manufactured by such concerns respectively have been stamped with said stamps, and sent into the market in large quantities; the concerns respectively claiming the right so to do; and such goods so stamped have had and have a good reputation in the market.

In June, 1871, Asa H. Rogers and William H. Watrous formed a copartnership for the manufacture of electro-silver-plated spoons, forks and knives, in Hartford, under the name of "W. H. Watrous," but Asa H. Rogers was not publicly known as interested therein, although he gave his time and service to it from January to September, 1871, and was an equal partner with Watrous.

In September, 1871, a joint stock corporation was formed, under the name of the "Rogers Cutlery Company," to carry on the same business. The stockholders appearing upon the stock book of the company were Theodore Rogers of Waterbury, who was not of the family of the Rogers brothers before mentioned, but a salesman with the plaintiff corporation, H. H. Moore, W. H. Watrous and the

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wife of the latter. Theodore Rogers was the only person of the name of Rogers openly known to be connected with the company or its name. Asa H. Rogers was never openly connected with this corporation upon its records, but was the real owner of one-half of its stock.

The spoons, forks and knives made by this corporation were stamped with a stamp containing the word "Rogers," and were sent into the market from 1872 to March 14th, 1879, so stamped, the knives in considerable quantities, the spoons and forks not to any great extent.

In March, 1879, an arrangement was made between the William Rogers Manufacturing Company and the corporation of the Rogers Cutlery Company, by which there was an exchange of stock, and both companies came under the same management, and the president of the Rogers Cutlery Company became president and manager of both companies. Since this arrangement the Rogers Cutlery Company has stamped its knives generally with the stamp "Rogers Cutlery Company," and it has issued business circulars to the trade.

Since the arrangement, before mentioned, of March, 1879, the two concerns, the William Rogers Manufacturing Company and the Rogers Cutlery Company, although, for purposes of trade and in public, keeping up their distinct organizations and names and stamps, have been in fact and actual operation but one concern, and both under the superintendence and management of W. H. Watrous; and besides the stamps before mentioned, they have also sometimes used the stamp "Rogers Silver Plate Co." upon job lots of spoons and goods. There is no company, in fact, of the name of the Rogers Silver Plate Co., and the stamp was arbitrarily adopted by these corporations for the special purpose mentioned.

In 1862 the Hartford corporation of Rogers, Smith & Company, before mentioned, failed and went into insolvency by assignment in the probate court of Hartford. Soon after a new corporation was formed in New Haven under that name, and which purchased the assets of that

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corporation, for the purpose of manufacturing electro-silver-plated spoons, forks and knives. About 1863 this corporation sold out to the Meriden Britannia Company, and its business was removed to Meriden, and its nominal organization has been ever since kept up, but its business has been actually carried on by the Meriden Britannia Company, and that has been so understood by the trade generally. From the organization of the corporation to the present time large quantities of goods have been sent into the market stamped with its name, and the corporation has been held out to the public as carrying on an independent manufacture, and their business has been kept separate and distinct. Neither of the Rogers brothers before mentioned has been in any way directly connected with this corporation.

In 1866 a joint stock corporation was formed at Meriden under the name of A. H. & S. S. Rogers Brothers, in pursuance of a contract between the Meriden Britannia Company and Asa and Simeon Rogers; and spoons, knives and forks were thereafter, to a very limited extent, sent into the market by the Meriden Britannia Company stamped "A. S. & S. S. Rogers Brothers." The corporation, although having a nominal organization, never actually manufactured goods.

Of these several concerns, with which the three Rogers brothers, or some of them, were connected, none has been in business since 1862, except as herein before found.

The goods made by the Meriden Britannia Company, William Rogers Manufacturing Company, Rogers Cutlery Company, and the plaintiff, and stamped as aforesaid, have always been equal to or better than the goods made by the three Rogers brothers, and have always had a high reputation in the market.

In 1863, and until the arrangement above stated of the Meriden Britannia Company with the plaintiff corporation in 1865, that company was the only competitor of the plaintiff using a "Rogers" stamp.

The plaintiff corporation of Waterbury, the Meriden

Britannia Company of Meriden, the William Rogers Manufacturing Company, and the Rogers Cutlery Company of Hartford, although having had, to a certain extent, common stock interests, as before stated, have conducted their respective manufacturing business and made their sales independently of each other and in the same manner as before such arrangements of stock interests. They have been competitors in the public markets. Each has claimed for itself the manufacture of a superior quality of goods. Each has claimed in certain advertising circulars to be the manufacturer of the only "genuine Rogers" goods, and to be legitimately entitled to the reputation which was attached to the original "Rogers Brothers."

All the goods made by the plaintiff stamped with said stamps have been of superior quality, and have had a high reputation in the market. The standard of quality adopted and used by the three Rogers brothers has not only been maintained, but the amount of silver put upon the goods has been from time to time increased, and the quantity of silver now used by the plaintiff is twenty-five per cent. in excess of that used by Rogers Brothers. The plaintiff has also from time to time made improvements in the style and workmanship of its goods, and has greatly improved the quality of its spoons by thickening the shanks.

The reputation of the plaintiff's goods is very much higher than was that of the goods made by the copartnerships, Rogers & Brother and Rogers Brothers, and the plaintiff's knives, forks and spoons are of a quality much superior to those made by those copartnerships or by any other party prior to the organization of the plaintiff corporation. Said stamp of the plaintiff has never been used except upon first quality goods, and the use of the same has been and is of great value to the business of the plaintiff.

By reason of the numerous stamps on spoons, forks and knives containing the word "Rogers," as before mentioned, and of the efforts of the various concerns who have used such stamps since 1847 to promote the sales of their goods

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as "Rogers goods," the word "Rogers" has become the conspicuous and familiar part of such stamps with a large class of retail buyers; and while jobbers and dealers, and those retail buyers who are informed of the facts, readily distinguish between the stamps of the different manufactories by the words or symbols which such stamps do not possess in common, those retail buyers of the articles who buy by the stamp or the single article, look only to the word "Rogers," and are for this reason liable to confound the various stamps; but generally the retail buyers who desire any information on the subject of the manufacture of the goods, rely upon the dealer for such information.

The plaintiff corporation, since its organization, has circulated price lists and advertisements extensively in the markets and among the trade.

William Rogers died in 1873, Simeon S. Rogers in 1874, Asa H. Rogers in 1876.

In the year 1866 the defendants, who are brothers, formed at Meriden their present copartnership under its present name of C. Rogers & Brothers, and there commenced the manufacture and sale of electro-silver-plated coffin trimmings. From that time to the present they have carried on business at the same place, and under the same copartnership name. The business so carried on has been principally the manufacture and sale of electro-silver-plated coffin trimmings, but for several years they have also dealt in and held themselves out to the public as manufacturers of a large variety of articles of furniture hardware, and of electro-silver-plated spoons, forks and knives. The articles of furniture hardware dealt in by them have been partly of their own manufacture; the spoons, knives and forks wholly of the manufacture of others, except as they were at one time connected with Charles Parker, under an arrangement which appears in the case of *Meriden Britannia Company v. Parker*, 39 Conn., 450.

The defendants have never stamped any of their goods with any mark, name or trade-mark, except as the spoons, knives and forks made by them recently have been stamped

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as herein stated. During the year prior to the commencement of this suit the defendants made extensive preparations and a large investment of capital for the purpose of carrying on the manufacture of silver-plated spoons, forks and knives, in connection with their other manufacturing business. Including this manufactory, their present investment of capital is between \$300,000 and \$400,000, and they employ about two hundred hands. Their business has gradually increased, and is now, and for some time has been, large and extensive, being carried on in all parts of the United States, and, to some extent, in the British provinces. They employ several local agencies and numerous traveling salesmen, and have acquired in such business an extended and valuable business reputation, doing a business in coffin trimmings averaging from \$45,000 to \$60,000 a year. A little less than one fourth of their customers deal in silver-plated spoons, forks and knives.

Since they have engaged in the manufacture of silver-plated spoons, forks and knives they have stamped upon the articles so manufactured by them, "C. Rogers & Bros. A 1," and they have sent such goods into the market mainly by their usual agencies and salesmen.

This stamp, "C. Rogers & Bros. A 1," is stamped upon the backs of the shanks of the spoons and forks in the same manner and place as the plaintiff's goods are and have been stamped. The method of stamping their name upon such articles manufactured by them, and the locality of the stamp upon the article, has been that commonly employed by manufacturers of such silver-plated articles for many years. The mark "A 1" has been frequently used by manufacturers of such ware for many years as a mark of quality, and is so regarded in trade.

The purpose of the defendants in stamping their firm name upon the spoons, forks and knives so manufactured by them has been to indicate to the public that they are the manufacturers of the goods so stamped. But the defendants in commencing the manufacture of such articles had in view the popularity in the market of such goods bearing

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a stamp containing the word "Rogers," and one inducement to commencing such manufacture was the advantage they might derive from having their goods so stamped. The allegations of fraudulent design and acts on their part contained in articles eleven to sixteen of the complaint are found not to be true.

Between the stamps so used by the defendants and the stamps used by the plaintiff upon similar articles manufactured by them respectively, the dealers and jobbers in such articles have no difficulty in distinguishing. And this is also true of those retail buyers who look beyond the word "Rogers;" but those who regard the word "Rogers" only would be liable to confound one with the other, as in the case of the various "Rogers" stamps before mentioned. Retail buyers sufficiently acquainted with the various "Rogers" stamps in the market, to distinguish between the same, would have no difficulty in distinguishing between the two stamps of the plaintiff and defendants, but the general resemblance between the two stamps is such that a person knowing that of the plaintiff and not knowing that of the defendants, might, upon referring to it, but not reading it attentively, mistake it for that of the plaintiff.

Upon the foregoing facts the plaintiff claimed, and asked the court to hold, as follows:—

1. That the defendants should be enjoined from the use of the combination of words, "C. Rogers & Bros.," on silver-plated knives, spoons and forks.

2. That the defendants should be enjoined from such use of the word "Rogers" as a part of any stamp or mark on the shank of silver-plated spoons and forks, in connection with or without the letters and figure, "A 1," as that purchasers will be liable to believe that spoons and forks so marked and made by the defendants were made by the plaintiff.

8. That the defendants should be enjoined from the use of the word "Rogers" in any way, as a stamp upon silver-plated knives, spoons and forks.

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But the court overruled these claims, and rendered judgment for the defendants. The plaintiff appealed.

F. Chamberlin and *O. H. Platt*, with whom were *J. P. Platt* and *H. R. Mills*, for the appellants.

The plaintiffs are lawfully and honestly using the stamp "Rogers & Bro., A 1," upon silver-plated spoons, forks and knives, and have used and advertised said stamp as their trade-mark continuously since 1859. The defendants, members of another family, and previously engaged in the manufacture of plated coffin trimmings, were induced, among other things, by the popularity of the Rogers goods, and the advantage they might derive from stamping such goods with that name, to commence the manufacture and sale of silver-plated spoons, knives and forks, and have stamped the same "C. Rogers & Bros., A 1," so that the goods of the defendants are liable to be mistaken for goods of the plaintiffs.

Except as associated with Charles Parker in the use of this same stamp (which use was enjoined by the court in *Meriden Britannia Co. v. Parker*, 39 Conn., 450), the defendants have never, until the spoon and fork business herein complained of was commenced, used any stamp, mark or trade-mark upon any of their goods, which include silver-plated coffin trimmings and a large variety of articles of furniture hardware, and of electro-silver-plated spoons, forks and knives. The defendants, in commencing the manufacture of such articles, had in view the popularity in the market of the similar goods bearing a stamp containing the word "Rogers," and one inducement to commencing it was the advantage they might derive from having the goods so stamped.

This stamp, "C. Rogers & Bros. A 1," is stamped upon the backs of the shanks of the spoons and forks in the same manner and place as the plaintiffs' goods are and have been stamped. The similarity of the stamps best appears upon the goods themselves as they are before the court; but the court below has found that "the general resemblance be-

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tween the two is such that one knowing that of the plaintiff and not knowing that of the defendants, might, upon referring to it, but not reading it attentively, mistake it for that of the plaintiffs;" and that "those who regard the word 'Rogers' only would be liable to confound one with the other."

The pleadings of the plaintiffs set forth substantially the foregoing facts, and allege that the defendants commenced the manufacture of silver-plated spoons, knives and forks, and stamped them "C. Rogers & Bros. A 1," and that said stamp is a close imitation of the plaintiffs' stamp "*Rogers & Bro. A 1;" also that the plaintiffs, on the first day of August, 1883, requested the defendants to cease using the stamp so used by them as aforesaid, which they refused to do. The defendants not denying such request, it is deemed to be admitted; and they also admit that they have so used said stamp and claim the right so to do. The use by the respective parties of the marks "*Rogers & Bro. A 1" and "C. Rogers & Bros. A 1," is admitted substantially as alleged by the plaintiffs.

But the defendants deny any fraudulent intent and acts, as set forth in paragraphs eleven to sixteen of the complaint, and aver that they use their own partnership name, believing they have the right so to do—stamping it upon their manufactured articles in the usual manner, and for the sole purpose of indicating that such articles were manufactured by them, and availing themselves of the reputation which they have acquired in the public markets. The principal contention between the parties in their pleadings grows out of the allegations of positive fraudulent acts, or of constructive fraud resulting from the acts, set forth in the paragraphs of the complaint mentioned.

The affirmative allegations of the plaintiffs are met by the affirmative, counter and inconsistent allegations of the defendants; thus creating an issue to be passed upon by the trier, who distinctly negatives the claim of the defendants in the finding that the "popularity which the defendants had in view, and of which they wished to derive the advan-

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tage," was not that which they (the defendants) had acquired in their business, but was "the popularity in the markets of spoons, knives and forks bearing a stamp containing the word 'Rogers,'" and which it clearly appears, from the facts proved, had been established by the plaintiffs and others, under whom the defendants do not claim. He then finds that "the allegations of fraudulent design and acts on their part, contained in articles eleven to sixteen of the complaint, are found not true."

The defendants, quoting only the last sentence of this finding, claim that the element of fraud "is negatived in every form" and entirely eliminated from the case. But the plaintiffs contend that the effect of the finding is not to strike out from the case all fraud, but to convey accurately to this court the precise fraud which the defendants had in mind as the "inducement to commence the business," and which they are seeking to accomplish. To do this the court finds that—(1) "The business of the defendants has been principally the manufacture and sale of silver-plated coffin trimmings." (2) "The spoons and forks dealt in by them have been wholly of the manufacture of others, except as they were connected with Charles Parker." (3) "They never have stamped any of their goods with any mark, name or trade-mark, except as the spoons and forks made by them recently have been stamped as before stated." (4) "The purpose of the defendants in stamping their firm name upon the spoons, etc., manufactured by them, has been to indicate that they were the manufacturers. But the defendants, in commencing the manufacture of such articles, had in view the popularity of goods bearing a stamp containing the word 'Rogers,' and one inducement to commencing such manufacture was the advantage they might derive from having goods so stamped."

Actuated by these motives they have put this stamp upon their spoons, knives and forks, and without other representations, simply sent out the goods so marked, allowing the stamp to secure to them such advantage as it necessarily must. No direct representations, outside of their stamp,

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were needed, and they were careful so to conduct themselves that extrinsic acts of fraud could not be proved against them. And so the court below has set out the facts, stating explicitly the knowledge, animus, inducement and circumstances of their "commencement" of the manufacture and use of the stamp, and then finding that allegations of other fraudulent acts and design were not true.

The stamp "Rogers & Bro. A 1" is the plaintiffs' trade-mark, and not merely a trade name, which they use in their business, as the defendants have used their partnership name "C. Rogers & Brothers" without stamping it on their goods—not merely "Rogers" or their own corporate name "Rogers & Brother," but "*" (the symbol), "Rogers" (the name), "&" (the connecting character), "Bro." (the abbreviation)—all connected and allocated, and used with the affix "A 1." Thus connected and stamped upon our goods, this is our trade-mark. Its use, and the purpose of its use, by the plaintiffs, are set forth and admitted in the pleadings. The pleadings allege and admit that the plaintiffs have always used this stamp for the purpose of indicating the maker of the goods.

"That any name, symbol or device, adopted by an individual, corporation or business firm for the purpose of designating the origin or ownership of goods manufactured by them, will be protected as a trade-mark, is well settled law. The name of a corporation or a partnership accomplishing the same object, will be protected upon the same principle." *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Manf. Co.*, 37 Conn., 292. This name is the best possible trade-mark, as it, of itself and by its own force, shows the origin of the goods and the name of the manufacturer.

Upton, in discussing the question what constitutes a trade-mark which will be entitled to protection, after a review of the cases, and the opinions of eminent judges, says:—"The simplest case of a trade-mark fulfilling the condition of the law, and thereby entitling him who adopts it to protection in its exclusive use, is the name and address of the manufacturer." Upton on Trade-Marks, 99. "It is precisely to

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the extent that any name, device or symbol, adopted as a designation for merchandise, is effectual in performing the office of the name and address of the manufacturer, that it complies with the essential requisite to the acquisition of an exclusive right to its use." *Id.*, 102. After referring on pages 109-112 to the cases of *Thompson v. Winchester* ("Thompsonian Medicines"), *Singleton v. Bolton* ("Dr. Johnson's Yellow Ointment"), and *Canham v. Jones* ("Vello's Vegetable Syrup"), as cases where the name of the person had acquired, as to those medicines, such generic meaning as not to be a proper trade-mark, he says, on page 113:—"These several cases of exceptions to the general rule, for the reasons which make them exceptional cases, serve to illustrate the character of the principle upon which the general rule is based. Certainly no name or mark or symbol that can be devised more faithfully fulfills the condition of designating the origin or ownership of the manufactured article than the name and address of the manufacturer. But when this precise name has been previously adopted, and has become known as the brand or trade-mark for the production of the particular person whose name it is, if it be used by another person who happens to have the same name as a designation for his production of a similar character, it is obvious that by reason of its previous adoption and notoriety it altogether fails to distinguish and identify the manufacture of the second party, and on the contrary, that such use must necessarily operate (as in such cases no doubt was the design,) to produce the belief on the part of the public that they are the productions of the principal manufacturer, with whose goods it has become identified." *Id.*

Given a trade-mark which, through a quarter of a century of honest work, has come to be a guaranty of the highest excellence of the goods which bear it, which has become known as the synonym of honest goods in all the markets of America, and which, having been stamped upon each article of the plaintiffs' goods, "has become of very great value" to them; can a new manufacturer, knowing the popu-

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larity of the stamp, and entering upon a similar manufacture with a view to the advantages which he may derive from such popularity, stamp his similar articles with substantially the same stamp, and start off in business with the advantage of prestige and reputation which the plaintiffs have so built up and earned? Manifestly such a thing would be a gross injustice.

But these defendants are obliged to reply: "Yes; he may if his family name happens to be the leading and significant word in the trade-mark." Is the reply sustained? and upon what possible ground? The defendants' only response to this question is the iteration and reiteration of the proposition—"Every man has a right to do business in his own name."

This general proposition—with the qualification that he so do his business that he does not, in intent or result, injure his neighbor previously established in the same business, may be admitted. That Charles Parker cannot use the stamp here used by the defendants, even when used by request of the defendants and in the manufacture of goods for the defendants, has been decided by this court in 39 Conn., 450, as we have seen.

In deciding this question of infringement, the only difference between the case of one who uses his own name for a stamp and one who uses a name not his own, is, that in favor of the owner of the stamp claimed to have been imitated and infringed, the former is presumed to use it for an honest purpose, while as to the latter fraud is presumed. In Parker's case the injunction was issued in spite of a clear finding of good faith, on the ground that the injury to the plaintiffs was the same. The wrong to the plaintiffs here is precisely what it was to the Meriden Britannia Co. in Parker's case—the injurious appropriation of the good will of the plaintiffs' business, and of the popularity of their goods in the markets.

But here the finding, while negating certain affirmative allegations of the plaintiffs, and also affirmative averments of the defendants in reply, expressly finds all necessary

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fraud in the following clause:—"The defendants, in commencing the manufacture of such articles, had in view the popularity in the market of such goods bearing a stamp containing the word 'Rogers,' and one inducement to commencing such manufacture was the advantage they might derive from having their goods so stamped."

The "necessary consequence of their acts," in manufacturing by their own hand, and selling, the same goods, bearing the same stamp, which they had previously sold when manufactured for them by Parker, in pursuance of their contracts with him, would be to inflict upon the present plaintiffs damage similar to that which they had inflicted upon the Meriden Britannia Co. by the former infringement, and to obtain for themselves alone profits which had before been divided between them and Parker.

Our case in this aspect is like that of *Royal Baking Powder Co. v. McQuade* (U. S. Circuit Court, Illinois District), Cox's Trade-Mark Cases, 671, in which Judge BLODGETT says:—"I think it is very manifest that there was an intention on the part of the manufacturer of this, the defendant's powder, to obtain the benefit of whatever labor and effort the complainant has used to give reputation and character to his goods." And like that of *Trainor* in which Judge CLIFFORD says:—"Of course, they meant to secure to their goods a preference which they otherwise would not have commanded; and it is difficult, if not impossible, to see how any such advantage could be gained, unless the simulated trade-mark would enable them to sell their fabric as that of the injured party." *Trainor's Case*, 101 U. S. Reps., 67.

The "of course" which Judge CLIFFORD acts upon, is here anticipated by the express finding of the trier. This finding plainly indicates a purpose of the defendants (in commencing this manufacture) to infringe the plaintiffs' trade-mark, and appropriate to their advantage its popularity as containing the word "Rogers." It is equivalent to a finding that they intended to "invade the property of the plaintiffs." *Wotherspoon v. Currie*, L. R., 5 H: L. Cas., 508.

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And "that the object was to obtain a slice of the large business carried on by the plaintiffs." BAGGALLAY, L. J., in *Massam v. Thorley's Cattle Food Co.*, L. R., 14 Ch. Div., 763-781. Such use must necessarily operate (as in such cases no doubt was the design,) to produce the belief on the part of the public that they are the productions of the first manufacturer, with whose goods it (the name) has become identified." Upton on Trade-Marks, 118. In his opinion in the case of *William Rogers Manf. Co. v. Rogers & Spurr Manf. Co.*, 11 Fed. Rep., 495, Judge LOWELL says:—"Even if we grant all that has been said about the freedom to use names (and I grant upon that subject much more than has been argued, for I set no limits to that freedom, excepting interference with acquired rights), the books are full of cases in which defendants have been restrained from using their own names in a way to appropriate the good will of a business already established by others of that name. *Croft v. Day*, 7 Beav., 84; *Metzler v. Wood*, L. R., 8 Ch. Div., 606; *Fullwood v. Fullwood*, L. R., 9 id., 176; *Levy v. Walker*, L. R., 10 id., 436; *Massam v. Thorley's Cattle Food Co.*, L. R., 14 id., 748; *McLean v. Fleming*, 96 U. S. Reps., 245; *Devlin v. Devlin*, 69 N. York, 212; *Filkins v. Blackman*, 13 Blatch., 440; *Stonebraker v. Stonebraker*, 33 Maryl., 252; *Shaver v. Shaver*, 54 Iowa, 208; *Churton v. Douglas*, Johns. (Eng.), 174. And see 25 Albany L. Jour., 205. All these cases in equity depend upon an appropriation by one person of the reputation of another, sometimes actually fraudulent, and sometimes only constructively so."

One of the defendants' briefs in the former hearing of this case opens as follows:—"It is more than thirty years since Lord Justice Knight BRUCE made his memorable declaration in *Burgess v. Burgess*, 17 Eng. Law & Eq., 257, that "all the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell them in their own names, and not the less so that they bear the same name as their fathers; and nothing else has been done in that which is the question

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before us." But a quarter of a century later (in 1880), in the highest court in Great Britain, Lord Justice JAMES says of that decision :—" Now *Burgess v. Burgess* has really been very much misunderstood if it has been understood to say that anybody can always use his own name, as a description of an article, whatever may be the consequence of it, or whatever may be the motive for doing it, or whatever may be the result of it." Thus the highest court in Great Britain is in accord with the late utterance of Judge LOWELL in our United States Circuit Court above quoted.

This stamp, which the defendants propose to use as a trade-mark upon their goods, serves them better than another, only as "securing the advantage of a popularity" not belonging to them, and of which they cannot possess themselves without damage to the plaintiffs. This, it is found, induced them to commence the business. In short, they adopted this business to "secure the advantage they might derive" from this stamp. This a court of equity will not permit. Common honesty would suggest the adoption of a stamp to protect one's own business; here a business is adopted, the "inducement" to which is that the defendants hope to be allowed to make use of a stamp which will steal another's business.

C. R. Ingersoll and *C. E. Mitchell*, with whom was *G. A. Fay*, for the appellees.

First.—The facts of the record compel the plaintiff to this position of law—that the plaintiff, as a manufacturer of electro-silver-plated spoons and forks, may (apart from contract) have such a right of trade-mark in the word "Rogers" that no other person lawfully engaged in a similar manufacture under that personal name can, as against the plaintiff, stamp the goods of his manufacture with his own name, in the manner customary with silver-plated spoon and fork manufacturers, to indicate the name of the manufacturer of their goods. It is safe to say that, within the entire range of English law, no decided case has yet been recorded to support this proposition. On the contrary,

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we submit that no manufacturer can gain a right of trade-mark in his personal name merely, as against another manufacturer bearing the same name. For the office of a trade-mark is to distinguish the goods of the manufacturer using it from the goods of every other manufacturer of the same article dealing in the same market; and this a personal name may not do. And therein lies the occasion for a trade-mark or symbol, having in itself an absolute distinctiveness, as a substitute for the personal name of the trader. Such symbol can have no significance but its own. It can point to one trader only—the one whose exclusive symbol it is. And, therefore, it cannot be innocently copied by any other trader. Nor, if used by another than the one whose goods it distinguishes, can such use ever be rightful. And this irrespective of motive; for the injury to the one whose right to use such symbol is exclusive is the same, whether the motive of the infringer be evil or innocent. But a personal name cannot, necessarily, have this distinctive and exclusive significance. It must always be liable to confusion with the same name when belonging, by an equal birth-right, to other traders in the same market. These are elementary principles. They are illustrated by the following cases: *Meneely v. Meneely*, 62 N. York, 427; *Carmichel v. Latimer*, 11 R. Isl., 395; *Faber v. Faber*, 49 Barb., 358; *Clark v. Clark*, 25 Barb., 76; *Williams v. Brooks*, 50 Conn., 280; *Canal Co. v. Clark*, 13 Wall., 311; *McLean v. Fleming*, 96 U. S. Reps., 245; *Comstock v. Moore*, 18 How. Pr. R., 424; *Gilman v. Hunnewell*, 122 Mass., 139. And, therefore, the U. S. trade-mark act of 1870 forbade the registry of any trade-mark consisting of the “name of a person, firm or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons.” And the English “Trade-mark Registration Act” of 1875, 38 and 39 VICT., c. 91, only recognizes “the name of an individual or firm,” as a trade-mark, when it is “printed, impressed or woven in some particular and distinctive manner.”

But the right of the manufacturer to protection against

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another's fraudulent personation of himself by means of a personal name is, none the less, obvious and adequate. And the cases of this sort are abundant. They fall into two general classes—(1) where the complaining manufacturer's name has been assumed by another, to whom the name does not rightfully belong, for the purpose of personation; or, (2) where the personation is effected by a person to whom the name does rightfully belong but who so uses it, by means of accompanying false devices, as to induce the belief that it is not his own name but is the name of the complaining manufacturer. In both these classes of cases the fraud will be stopped—in the one case the fraudulent assumption of the name, in the other the use of the false devices. In the first of these classes the personation is commonly attempted by the organization of a corporation under an assumed personal name. The cases particularly relied on by the plaintiff here, *William Rogers Manf. Co. v. Rogers & Spurr Manf. Co.*, 11 Fed. Rep., 495, *Holmes v. Holmes*, 37 Conn., 278, and *The Thorley Cattle Food Case*, 42 L. J., N. S., 851, and L. R., 14 Ch. Div., 748, are of this class. The *Glenfield Starch Case* (*Wotherspoon v. Currie*), L. R., 5 H. L. Cas., 508, is within the same principle. In *Meriden Britannia Co. v. Parker*, 39 Conn., 450, both plaintiff and defendant were using in their stamps an assumed personal name. The court held that the name constituting a part of the plaintiff's stamp was that of the persons actually concerned in the manufacture of the plaintiff's goods (which was not the case with the defendant), and, therefore, the entire mark was entitled to protection. But it still refused to enjoin the use of "the mere name." In the other class of cases, we have noticed, the false personation is accomplished by fraudulent devices connected with the use of the defendant's rightful name—the effect of the devices being to pervert the rightful significance of the name. *Holloway v. Holloway*, 13 Beav., 209; *Burgess v. Burgess*, 3 De G., M. & G., 896; *James v. James*, L. R., 13 Eq., 421; *Fullwood v. Fullwood*, L. R., 9 Ch. Div., 176; and *Clark v. Clark*, *supra*,—are familiar instances of this

class. The *Thorley Cattle Food Case*, in one of its aspects, also comes within it. In all of these cases the use of the fraudulent devices was enjoined, but in none of them the use of the name without the devices. In the editor's note to *Meriden Britannia Co. v. Parker*, in 12 Am. Reports, 401, the cases of this class are collected, with the conclusion that "in such cases the use of such (connected) mark or device or the practice of such acts will be restrained, but not the use of the name."

The present case cannot be brought within either of these two classes of cases. The firm name stamped by the defendants upon the goods of their manufacture is the firm name under which, as the record finds, they have carried on business as manufacturers for nearly twenty years and which has a valuable reputation in the markets of the country. And "Rogers" is the birth-name of each one of the several members of the firm. The finding expressly negates the use by the defendants of any devices or practice of any arts, to give to the use of their own name any wrongful significance. And the only error complained of in the plaintiff's appeal is that the court below did not enjoin the defendants from stamping either their firm name merely, or their family name of "Rogers" merely, upon their goods.

Second.—The record not only negates the specific allegations of fraud contained in the complaint, but it expressly finds that "the purpose of the defendants in stamping their firm name upon the spoons and forks so manufactured has been to indicate to the public that *they* are the manufacturers of the goods so stamped." It is not possible, by anything else in the finding, to distort this into a finding that the purpose of the defendants has been to indicate to the public that *the plaintiffs* are the manufacturers of the goods so stamped. But suppose the inference to be admissible, that the motive of the defendants in engaging in the silver-plated spoon and fork manufacture, and stamping the goods of their manufacture with their name, was to profit by the popularity that had already been given to the "Rogers" name in such manufacture. How can the existence of any

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such mental motive, whether as hope, expectation or purpose, rightfully debar the defendants from engaging in such business under their own name, or, when so engaged in it, from carrying it on in precisely the same manner that they might carry it on had their names not happened to be Rogers? The injury complained of by the plaintiff is that purchasers mistake the defendants' name, when stamped upon spoons and forks, for the plaintiff's name. Is this injury affected, in any degree, by the motive of the defendants? Clearly, the liability to mistake by the purchaser is equally great whether a good or a bad motive be imputed to the defendants. In the recent case of *Singer Machine Manufacturers v. Wilson, L. R.*, 3 App. Cas., 391, it is said: "But if a man has legitimately a right to the property in an exclusive use of a name, it is of small account to him should it be invaded, whether the invasion comes from a purpose to deceive, or from ignorance or inadvertence, or an honest misconception of the relative rights of the parties." And so, conversely, it must also be true that if a man has not legitimately a property right in the exclusive use of a name, his inquiry into the motive of another man, who has an equal right to the use of the name, is immaterial. Clearly, the right to such exclusive use cannot depend either upon the good motive of the man asserting it or the bad motive of the man denying it. It would be a curious injunction which should restrain a certain act, or not, according to the intention of the defendant in doing the act. And, therefore, as we have seen, in *Burgess v. Burgess*, *Holloway v. Holloway*, *James v. James*, *Fullwood v. Fullwood*, and the other cases of their class cited, where the purpose of the defendant to avail himself of the trade reputation of the plaintiff was clearly manifested by the fraudulent devices with which he accompanied the use of his name, the use of the name was, in no instance, enjoined; although in every case the accompanying devices were enjoined. The inconvenience that may result from the common use of a name to which each party has equal right is *damnum absque injuriâ*.

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Third.—The plaintiff's conduct disentitles it to the relief asked. The very principle which it invokes against the defendants is fatal to its own case. It is itself sailing under false colors. Its corporate name was taken and the record and even the complaint itself shows, that its stamp is and has been used for the purpose of inducing the public to believe that its goods are made by "the genuine and original Rogers brothers," that is, by William, Asa and Simeon Rogers, who carried on the manufacture of similar goods at Hartford as the copartnership of Rogers Brothers from 1847 to 1853, and by whose personal efforts the original "Rogers" reputation was created, but who are all long since dead. The record shows that the plaintiff is now falsely holding itself out as carrying on a business which was thus established by these brothers at Hartford in 1847, and by them thereafter removed to the plaintiff's present factory in Waterbury. Equity will never enjoin a trade-mark that tells the truth. Nor will it protect a trade-mark that tells an untruth. The defendants' mark tells the truth. The plaintiff's mark tells an untruth. The plaintiff thus "places itself beyond the pale of the protection of the law." Upton on Trade-marks, p. 30. Nor would the plaintiff's case be aided if the original Rogers brothers had ever attempted to confer upon the plaintiff the right to thus hold themselves out to the public. "The privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce." *Partridge v. Menck*, 1 How. Court of App. Cases, 558, and *Cox's Trade-mark Cases*, 72. And since the *Leather Cloth Company Case*, 11 H. L. Cases, 523, this principle has been firmly imbedded in the law of trade-marks. It has received recent recognition by the Supreme Court of the United States in *Manhattan Medicine Co. v. Wood*, 108 U. S. Reps., 218.

STODDARD, J. As we understand the finding and rulings of the Superior Court, practically the only question left for the determination of this court is in respect to the plaintiff's exclusive right, as against these defendants, to stamp

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the word "Rogers" upon silver-plated flat ware, such as knives, forks, spoons, etc. In considering this subject it must constantly be borne in mind that all questions of fact are finally disposed of by the Superior Court, and that this court cannot, even by inference, supplement such finding, or supply omitted facts. Under our practice this court is controlled by the finding as it comes to us. The case stands upon an answer denying the material allegations of the complaint, and in so far as the Superior Court omitted to find true the allegations and claims of the plaintiff, those allegations and claims must be regarded as not proved.

The defendants stamped upon the shanks of spoons and forks manufactured by them the combination of words "C. Rogers & Bros. A1." The plaintiffs' stamp is "* Rogers & Bro. A1." The finding states in detail the use by several different partnerships or corporations of stamps all bearing the common and distinctive word "Rogers," and differing from each other in all other material respects except in the use of this common and conspicuous word "Rogers," one concern using a stamp with the word "Rogers" alone. The finding then proceeds: "By reason of the numerous stamps on spoons, forks and knives, containing the word 'Rogers,' as before mentioned, and of the efforts of the various concerns who have used such stamps since 1847 to promote the sale of their goods as 'Rogers goods,' the word 'Rogers' has become the conspicuous and familiar part of such stamps with a large class of retail buyers; and while jobbers and dealers, and those retail buyers who are informed of the facts, readily distinguish between the stamps of the different manufactories by the word or symbols which such stamps do not possess in common, those retail buyers of the articles who buy by the stamps or the single article look only to the word 'Rogers,' and are for this reason liable to confound the various stamps; but generally the retail buyers who desire any information on the subject of the make of the goods, rely upon the dealer for such information."

It appears from the extract that there are two governing

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facts:—1st, that the word “Rogers” is the conspicuous, familiar, material and valuable thing in the various so-called trade-marks; 2d, that the stamp of the defendants is liable to be mistaken for that of the plaintiffs because of the use of the word “Rogers,” and by that limited class alone who look only to the word “Rogers.” And again the case states:—“Between the stamps so used by the defendants and the stamps used by the plaintiffs upon similar articles manufactured by them respectively, the dealers and jobbers in such articles have no difficulty in distinguishing. And this is also true of those retail buyers who look beyond the word ‘Rogers.’ But those who regard the word ‘Rogers’ only would be liable to confound one with the other, as is the case of the various ‘Rogers’ stamps before mentioned. Retail buyers sufficiently acquainted with the various ‘Rogers’ stamps in the market to distinguish between the same would have no difficulty in distinguishing between the two stamps of the plaintiffs and defendants; but the general resemblance between the two stamps is such that a person knowing that of the plaintiffs and not knowing that of the defendants might, upon referring to it, but not reading it attentively, mistake it for that of the plaintiffs.” Thus, with reiteration the court below emphasizes the fact that the word “Rogers” is the controlling word—the one thing that is the basis of all possible confusion or mistake in the use of the two stamps.

There is no finding nor suggestion of fact that any other part of the defendants’ stamp is answerable in any degree for that liability to mistake. If any other part of the stamp, in configuration, collocation, or combination of words, figures or symbols, or in other respect, contributed in any manner to deceive possible purchasers and enable the defendants to sell their goods as those of the plaintiffs, it should so have been found by the trial court. This court cannot find such facts from an inspection of the stamp itself. This is not a case where this court can pronounce as matter of law that the defendants’ stamp in other particulars so resembles that of the plaintiffs as to amount to a represen-

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tation that the goods are the plaintiffs' goods. In this particular the case at bar differs from many of the cases cited in the briefs of counsel. In some of the English cases relied upon, and in other instances, the court determined from the evidence in the particular case whether the stamp was of objectionable character, thus exercising a combined jurisdiction over fact and law. In our courts, as before stated, these jurisdictions are separated, the fact being committed to the Superior Court, and the law to this court.

It is said that this stamp, "C. Rogers & Bros. A1," is "stamped upon the backs of the shanks of the spoons and forks in the same manner and place as the plaintiffs' goods are and have been stamped." This is undoubtedly an evidential fact, from which the trial court might, in connection with other circumstances, have found a liability to deceive, on account of the location and peculiar characteristic of the defendants' stamps, but the court has not so found; presumptively the evidence did not warrant that conclusion; and, on the contrary, the court repeatedly tells us that the word "Rogers" alone is the only possible misleading character. And further, we are informed that "the method of stamping their name upon such articles manufactured by them, and the locality of the stamp upon the article, has been that commonly employed by manufacturers of such silver-plated articles for many years. The mark 'A1' has been frequently used by manufacturers of such ware for many years as a mark of quality, and is so regarded in the trade." Manifestly upon this condition of facts, in the absence of a finding that the location of the stamp, combining with its form, might have a misleading effect, we cannot say as matter of law that it does have that possible effect, particularly in view of this finding, that the location of the stamp is common to the trade, and the addition of the marks of quality, "A1," is commonly used by manufacturers as a quality mark. We feel constrained by the facts in the case to say that there is no foundation laid for the claim that we should rule as matter of law that the judgment of the Superior Court is erroneous, so far as that

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judgment relates to the stamp in question in other respects than the use of the word "Rogers."

This appeal raises the question of error or no error upon the facts found, and "when, therefore, on such appeal, the record omits to present facts essential to the case of the appellant, this court can simply affirm the judgment, and cannot remand the case to the lower court for amendment, or a further hearing or finding." *Schlesinger v. Chapman*, 52 Conn., 273.

Have these plaintiffs, as against these defendants, an exclusive right to the use, in their stamp, of the word "Rogers"? Upon this branch of the case there is one further fact stated as follows: "The purpose of the defendants in stamping their firm name upon the spoons, forks and knives so manufactured by them, has been to indicate to the public that they are the manufacturers of the goods so stamped. But the defendants, in commencing the manufacture of such articles, had in view the popularity in the market of such goods bearing a stamp containing the word 'Rogers,' and an inducement to commencing such manufacture was the advantage they might derive from having their goods so stamped." And then the court finds: "The allegations of fraudulent design and acts on their [the defendants'] part, contained in articles 11, 12, 13, 14, 15 and 16 of the complaint, are found to be not true." The 11th article contains an allegation that the defendants, "with intent to defraud" the plaintiffs, sent their goods into the market with marks closely resembling the claimed trade-marks of the plaintiff. By article 12 it is stated that by the external shape and appearance of the goods, together with the stamp and mode of selling, the defendants caused their goods to resemble the plaintiffs'. Article 13 contains an allegation that the defendants' stamp is a close imitation of the plaintiffs', and is an infringement of their trade-mark, and is well calculated to mislead and deceive, and does deceive purchasers, and induces them to buy the defendants' goods supposing them to be of the plaintiffs' manufacture. Article 14 alleges that the defendants' goods will become known

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as "Rogers" goods, and that thereby purchasers will be led to buy the defendants' goods believing them to be the plaintiffs'; and by article 15 it is alleged that the defendants fraudulently stamp the word "Rogers" on their goods, intending it to operate as a fraud upon the public, upon unwary purchasers, and upon the plaintiffs, in the ways above set forth, *etc.* So far the trial court has wholly negated the claim of the plaintiffs that the defendants were actually fraudulent in the use of their stamp, and that such stamp was intentionally used to personate the plaintiffs' goods, notwithstanding the finding that the defendants had in view the popularity of goods marked "Rogers," and that one inducement was the advantage they might derive from so stamping their goods. But in saying that the allegations of fraudulent design and acts on their part, contained in article 16 of the complaint, are found to be not true, the trial court goes further than to deny the assertion of active, personal, intentional, fraudulent design and counterfeiting, and negatives the constructive fraudulent design implied in the statement contained in that article.

Article 16 is as follows:—"That by reason of the facts aforesaid the use of the word 'Rogers,' either as the whole or a part of their stamp upon spoons, forks and knives, must and will, under the fixed circumstances inevitably connected with such use, necessarily infringe upon the plaintiffs' lawful enjoyment of the use and benefit of their trademarks aforesaid, and must and will induce and cause unwary purchasers and others to purchase the spoons, forks and knives of the defendants, stamped with the word 'Rogers,' either as the whole or as a part of their stamp, in place of, and supposing them to be, spoons, forks and knives manufactured by the plaintiffs, to the great injury of the plaintiffs and in fraud of their rights." In this article there is no statement of active fraud, or intentionally misrepresenting the defendants' goods to be those of the plaintiffs, but only a statement that inevitably any use, no matter how honest and customary, of the word "Rogers" in the stamp, will induce and cause unwary purchasers to purchase goods

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of the defendants' make, supposing them to be the plaintiffs', and therefore any use of the word "Rogers" in such stamp by the defendants is thus constructively fraudulent. This conclusion and assertion of the plaintiffs, so stated, is denied by the trial court. The plaintiffs' case is stripped, by the finding, of every fact collateral or additional to the mere use of the word "Rogers" in the stamp.

The plaintiffs' claim, as thus stated, is surely not warranted by any decided case or the authority of any test-writer brought to our attention. Substantially all the leading and governing facts and characteristics of the recent English case of *Massam v. Thorley's Cattle Food Co.*, L. R., 14 Ch. Div., 748, a case that is largely relied upon by the plaintiffs, are eliminated from the plaintiffs' case. A few citations from the several opinions in that case will indicate how fundamentally different it was from the case with which we are dealing. And it should be borne in mind that this English court was considering questions of fact upon the evidence in the case. Page 755: "'Thorley's Food for Cattle' meant that food which for many years was manufactured at works belonging to Joseph Thorley, and afterwards was manufactured by his executors carrying on his business at the same works." Page 456: "We have heard nothing like a satisfactory explanation of how J. W. Thorley's company came into existence, unless it was that the promoters thought that Thorley's food was a very profitable thing, and had got a great reputation, and that they should like to steal the reputation which it had acquired. In order to do that they somehow or other got into communication with a brother of the late Joseph Thorley, who for some years had been in the service of Joseph Thorley, and during those years, according to his own account, which I take to be true, had acquired a knowledge of the recipe and of the manufacture, but who, for several years previous to the existence of this company, had never had anything to do with the manufacture of food for cattle. Having the name of Thorley, which was the distinguishing mark of the food for cattle, he either tendered himself for sale, or was found for pur-

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chase by some persons, in order that his name might be got into a joint stock company formed for the sake of selling these goods. Why was that name got in there except for the purpose of inducing the world to believe that it was the same concern, or that it was the same Thorley, or a continuation of the same Thorley, whose name was the principal characteristic of the name of the article? The name of the company is, to my mind, a fiction. The meaning which the name of 'J. W. Thorley & Co., Limited' would convey to any person's mind, is that there had been a partnership of J. W. Thorley & Co., a real partnership, which had been carrying on business in the manufacture of this food for cattle, and that for some reason or other, such as we have seen constantly in our experience in this court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business. . . . I am, therefore, of opinion that in this case what the defendant company have done has been calculated to deceive, and I am bound to say, in my judgment, I have no doubt was from the first intended to deceive the persons purchasing their article into the belief that they were purchasing the article which Joseph Thorley had formerly manufactured at the works which had attained the great reputation which Thorley's manufacture appears to have obtained." BAGGALLAY, L. J., said:—"I do not profess to say now whether J. W. Thorley, if honestly carrying on business on his own account in the manufacture and sale of this article, might not call it 'Thorley's Food for Cattle,' provided he took proper precautions to prevent it being supposed that the article he was so manufacturing was manufactured by the representatives of Joseph Thorley, but I feel satisfied that the company has no right whatever to use that name. I am strongly inclined to the opinion, though it is unnecessary to decide, that according to the view of Lord WESTBURY in the Glenfield Starch case, the expression 'Thorley's Food for Cattle' indicates the trade denomination of the article manufactured by the particular person, but even on the assumption that the defendant company

had not only the right to manufacture this article but to call it 'Thorley's Food for Cattle,' I have come to the conclusion on the evidence that they adopted such a mode of endeavoring to push that article in the market as to induce many persons to entertain the reasonable belief that the article they were so putting upon the market had been manufactured by the representatives of Joseph Thorley." BRAMWELL, L. J., said :—"The complaint of the plaintiffs is not that the defendants made and sold the same article that the plaintiffs make, but that it was sold in such a way as to induce purchasers to believe that it was the article manufactured by the establishment which was Joseph Thorley's, and now is carried on by his executors. The learned counsel for the defendants admit that, if that is so, there is a cause of action against them, and that they must be restrained from doing it. The question, therefore, is one of fact—was the trade so carried on by the defendants as to give rise to that belief? It appears to me almost impossible to entertain a doubt upon that question." JAMES, L. J., finally announced that an injunction would issue, and Mr. Glasse, who was of counsel, said :—"But is it not the substance of your Lordship's judgment that they are not to use the word Thorley in connection with their cattle food?" JAMES, L. J. :—"We cannot prohibit their using the name if they use it in a way not calculated to mislead the public."

Quotations are made at such length from this case because of the importance apparently attached to it by the plaintiffs. It will be seen that the case was regarded as one where a joint stock company had assumed the name of "Thorley" with the preconceived design of inducing the public to believe that their manufacture was that of the plaintiffs, with the intent to pirate the marks of origin of the plaintiffs' goods. In this view the English case goes no further than this court in *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manf. Co.*, 37 Conn., 278. Further, as indicated by their opinions, the judges strongly leaned to the position that "Thorley's Food for Cattle" had, under the evidence in the case, come to indicate the

trade denomination of the article manufactured by the particular person, and had obtained that secondary meaning wholly apart from its ordinary and apparent meaning, assimilating it, in this particular, to the "Glenfield Starch" case in *Wotherspoon v. Currie*, L. R., 5 H. L. Cas., 508. Lastly, the English case, as the final and determinate view of the case, was treated as a case of intentional false representation by the defendants, in their method of advertisement by labels, and method of packing goods and carrying on their business. This is shown by the refusal of the court to enjoin the use of the word "Thorley" absolutely in the cattle food business, and permitting its use so long as that use was not calculated to mislead. The *rationale* of the decision of *Massam v. Thorley's Cattle Food Co.* is that it was a case of actual intentional misrepresentation. The scope and limit of the ruling in that case, in regard to the use of the name "Thorley," is fixed by the decision of the same court in *Thorley's Cattle Food Co. v. Massam*, in which the court protected by injunction the "Thorley's Cattle Food Company" in the prosecution of its business in that name against circulars and advertisements of the defendants, the executors of Joseph Thorley. Both JAMES and BAGGALLAY, L. Js., in the latter case, refer approvingly, and as containing the gist of the law, to the language of Lord Justice TURNER in *Burgess v. Burgess*, 3 DeGex, M. & G., 896, as follows:—"No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. When a person is selling goods under a particular name, and another person, *not having that name*, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses. But when the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case, whether there is false representation or not."

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Considered in the ordinary course of trade, it is a contradiction of terms to say that a man selling goods under his own name sells them as the goods of another, even if that other have the same name. The cases seem to require some element of false representation other than that implied in the fair, honest and ordinary use of a person's own name.

An examination of the following and kindred cases wherein the use of a person's name has been regulated, will show that in most instances conscious, intentional fraudulent misrepresentation on the part of the defendant had been resorted to; in others, there was such a combined use of the name with other marks, characters, figures, or form and arrangement of circulars, advertisements, *etc.*, as to amount to a false representation, and the combination only was enjoined. No instance can be found where the use of the name only, in good faith, has been stopped. See *Croft v. Day*, 7 Beavan, 84; *Holloway v. Holloway*, 13 Beavan, 213; *Clark v. Clark*, 25 Barb., 78; *Sykes v. Sykes*, 3 Barn. & Cress., 541; *Metzler v. Wood*, L. R., 8 Ch. Div., 608, 610; *Fullwood v. Fullwood*, L. R., 9 Ch. Div., 179; *Devlin v. Devlin*, 69 N. York, 214; *Landreth v. Landreth*, 22 Fed. Rep., 41; *Shaver v. Shaver*, 54 Iowa, 213; *Stonebraker v. Stonebraker*, 33 Md., 268; *Williams v. Brooks*, 50 Conn., 278; *Meriden Britannia Co. v. Parker*, 39 Conn., 450.

Upon the other hand there has been, from the first to the present time, a general consensus of judicial opinion that the use of a personal name in a fair, honest and ordinary business manner, could not be prevented, even if damage resulted therefrom. *Croft v. Day*, 7 Beavan, 84; *Holloway v. Holloway*, 13 id., 213; *Burgess v. Burgess*, 3 De Gex, M. & G., 896; *Faber v. Faber*, 49 Barb., 357; *Clark v. Clark*, 25 id., 80; *Meneeley v. Meneeley*, 62 N. York, 427; *Comstock v. Moore*, 18 How. Pr., 424; *Gilman v. Hunnewell*, 122 Mass., 139; *McLean v. Fleming*, 96 U. S. Reps., 252; *Carmichel v. Latimer*, 11 R. Isl., 395; *Landreth v. Landreth*, 22 Fed. Rep., 41; *Singer Manf. Co. v. Long*, L. R., 18 Ch. Div., 412. Other cases and *dicta* might be cited; but it is deemed unnecessary.

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In one brief filed for the plaintiffs it is said that they make no exclusive claim to the word "Rogers;" but there is coupled with that disclaimer a statement that the word "Rogers" is the conspicuous and valuable part of their mark, and that any use of it by the defendants, in the ordinary way of manufacturers, by stamping their goods with it, either alone or in any combination, will indubitably produce results which they are now striving to prevent; and in another brief filed by other counsel of the plaintiffs the broad claim is made that the word "Rogers" used as a stamp should be stopped. And, as we have before said, this is the only contention left to the plaintiffs by the finding of the court below.

In conclusion, we think there is neither authority nor reason in support of the doctrine that the fair, honest use of a name can be enjoined when it is used in the ordinary course of business, in the way and manner in which other manufacturers of similar goods are accustomed to use their own name in the preparation for sale, or sale, of goods; that such a rule would operate in restraint of trade, and prohibit a person from using the ordinary means that all are entitled to use in the prosecution of business enterprises; that such use contains no element of false representation or personation in any just and true sense, and that, while it may be true that a possibility exists that the goods of one will be purchased to some extent by persons who either know no distinction, or even by the occasional few who suppose them to be the goods of another, this condition of things is inevitable in trade and commerce, inhering in the nature of things, and attaches in kind, if not in degree, in all cases where a manufacturer sends goods of any particular description, but without distinguishing mark, into a district or country where such goods were before that time unknown, and establishing a reputation in that district or country as the manufacturer and vendor of such goods. Any new comer in the same district with similar goods would undoubtedly profit by the reputation of the former's goods; yet the benefit to the public generally of free com-

petition, and the natural rights of all to seek any and all markets, would render ineffectual all attempts to shut out such new comer.

Since the preparation of the foregoing opinion the second edition of "Browne on Trade-Marks" has been distributed. That author, upon a review of the cases, lays down this proposition:—"A manufacturer has a right to affix his own name to an article of his own production. And any injury which another manufacturer, having the same surname, may suffer in consequence thereof, is *damnum absque injuria*." Sec. 420. And in his commentary upon *Howe v. Howe Machine Co.*, 50 Barb., 236, he says:—"This case is apt to mislead the superficial observer, and even for a moment stagger the preconceived notions of one used to critical examination. It has been cited more than once in support of this absurd proposition, to wit: that when two men in the same trade have the same surname, one may employ that surname as a trade-mark, to the exclusion of any such right by the other; that is, when two brothers have made and sold sewing machines, the one who first stamped his surname upon a machine was the sole possessor of the right to stamp his workmanship with his true name. This conclusion has no warrant from any authoritative source." Sec. 423.

There is no error in the judgment of the Superior Court.

In this opinion CARPENTER and GRANGER, Js., concurred.

LOOMIS, J. The able argument in support of the majority opinion is so well calculated to produce the impression that the finding of the Superior Court leaves no possible basis for granting any relief to the plaintiff, that it will be necessary to examine the pleadings and finding somewhat carefully, to show the grounds for my dissent. If we exclude from paragraphs eleven to sixteen of the complaint all allegations of fraudulent designs and acts, there will remain the averments that the plaintiff is a corporation duly

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organized under the laws of this state, and that since 1859 it has been and now is extensively engaged in the manufacture of silver-plated spoons, forks and knives, and has large capital invested in that business; that in 1858 Asa H. and Simeon S. Rogers formed a partnership under the name of "Rogers & Brother," and engaged in the business of manufacturing and selling silver-plated spoons and forks and knives, which was continued till December 18th, 1859, when the plaintiff corporation was organized and purchased the property, and succeeded to the business and all the rights of the partnership, that said partnership had adopted and used in its business the trade-mark "* Rogers & Bro.," sometimes adding the suffix "A 1"—stamping it upon the goods manufactured by said firm, and that the plaintiff upon succeeding to the business of said partnership, lawfully continued to use, and has ever since lawfully used, and intends in the future to use in its business said trade-mark with said suffix, stamping the same upon the spoons, forks and knives manufactured by it; that the sale of the plaintiff's goods so stamped has been widely extended, and that owing to the skill and integrity of the plaintiff in their manufacture they have constantly maintained a special, peculiar, good and valuable reputation among the trade and among purchasers generally, and that the business of the plaintiff has been largely built up and extended by such reputation, and is now largely dependent for its profitable continuance upon the reputation so attached to its goods by the use of such stamp thereon; that said trade-mark is of great value to the plaintiff and will continue to be so if the wrongful acts of the defendants shall be stopped; that the defendants, well knowing the premises, and knowing that if they could send spoons, forks and knives into market bearing a stamp that would cause them to be called "Rogers goods" or by any of the names whereof the word "Rogers" is the specially conspicuous part, they could sell them much more readily and for a higher price than if the stamp did not contain the word "Rogers;" and intending to cause their goods to be called by some name of which the word

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"Rogers" forms the conspicuous part and so obtain advantage of the reputation which attaches to goods bearing the plaintiff's trade-mark "* Rogers & Bro. A 1," did, on or about the 15th day of June, 1883, begin the business of making and selling silver-plated spoons, forks and knives, and stamping upon them marks resembling said trade-marks of the plaintiff, and in particular the following, to wit: "C. Rogers & Bros. A 1," and to send into the market and sell spoons, forks and knives so stamped, and have ever since continued so to do; that by reason of said facts the use by the defendants of the word "Rogers" as a stamp upon spoons, forks and knives will cause unwary purchasers to purchase the goods of the defendants so stamped, supposing them to be manufactured by the plaintiff, to the injury of the plaintiff; and that the plaintiff, on August 1st, 1883, requested the defendants to cease using the stamp aforesaid, but they then refused and still refuse.

Of the material allegations stated above the defendants admit that in 1858 Asa H. and Simeon S. Rogers formed a partnership under the name of "Rogers & Brother," and under that name engaged in the manufacture of silver-plated ware; that in 1859 the plaintiff corporation was organized under the name of "Rogers & Brother," purchased the property of the copartnership and succeeded to its business and has ever since been engaged in the manufacture of silver-plated spoons, forks and knives, and has a large amount of capital engaged in the business; and that the partnership "Rogers & Brother" during its existence stamped the goods of its manufacture with the name of said copartnership, either in full or in the abbreviated form of "Rogers & Bro.," and that the plaintiff corporation has, since it engaged in the business, stamped the goods of its manufacture with its corporate name, either in full or abbreviated, and that said copartnership and corporation sometimes added to their mark "A 1." They also admit the use of the star, and that the plaintiff's goods while so stamped have had a good and valuable reputation in the public markets.

The defendants aver that they have been extensively

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engaged in business as manufacturers and sellers under their partnership name of "C. Rogers & Bros." since 1866; their manufacture being principally that of silver-plated coffin trimmings; and that in that business their partnership name has acquired a high reputation and been of great value to them. And in reply to paragraphs eleven to sixteen of the complaint, they aver that they have been engaged in and are intending to carry on, in connection with their other silver-plated manufacture, the manufacture and sale of electro-silver-plated spoons, forks and knives, and have made a large investment therein, and that they have stamped upon the articles so manufactured their partnership name for the sole purpose of indicating that such articles are manufactured by them, and of availing themselves of the reputation which they (the defendants) have acquired in the public markets as before-mentioned.

This ~~the~~ defendants insist that they have a lawful right to do, and that the doing thereof can afford no lawful ground of complaint to the plaintiff.

The court finds (among other things) that when the plaintiff corporation was formed in 1859, both members of the partnership formed in 1858 (Asa H. and Simeon S. Rogers) were associates in such formation, and became stockholders and officers in such corporation, and that the corporation so formed "acquired by purchase all the property and business of said firm, including its said stamp and good will, and has ever since used said stamp in its business, always stamping the same upon the back of the shank of the forks and spoons, and that the use of said stamp was never objected to by any of said brothers; that the goods made by the plaintiff, and stamped as aforesaid, have always been equal to or better than the goods made by said three Rogers brothers, and have always had a high reputation in the market; that the standard of quality has not only been maintained, but the amount of silver put upon the goods has been increased from time to time, and the quantity of silver now used by the plaintiff is twenty-five per cent. in excess of that used by Rogers Brothers; that the plaintiff has also from time

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to time made improvements in the style and workmanship of the goods and has greatly improved the quality of its spoons by thickening the shanks; that the reputation of the plaintiff's goods is very much higher than was that of the goods made by said partnership; and that the plaintiff's knives, forks and spoons are of a quality much superior to those made by said partnership or by any other party prior to the organization of the plaintiff; that said stamp of the plaintiff has never been used except upon first quality goods, and the use of the same has been and is of great value to the plaintiff; that prior to the acts complained of the spoons knives and forks dealt in by the defendants were wholly of the manufacture of other parties than themselves, except as they were at one time connected with Chas. Parker, under an arrangement which appears in the case of *Meriden Britannia Company v. Parker*, 39 Conn. Reps., 450; that the defendants have never stamped any of their goods with any mark, name or trade-mark except as the spoons, forks and knives made by them recently have been stamped as herein stated; and that their stamp "C. Rogers & Bros. A 1" is stamped upon the backs of the spoons and forks in the same manner and place as the plaintiff's goods are and have been stamped.

The majority of the court, in their opinion, after referring to various uses of the name "Rogers" by one or other of the brothers, most of which have been abandoned for many years and which do not seem to have any material bearing upon any question in this case, say:—"Thus with reiteration the court below emphasizes the fact that the word 'Rogers' is the controlling word, the one thing that is the basis of all possible confusion or mistake in the use of the two stamps. * * * There is no finding or suggestion of fact that any other part of the defendants' stamp is answerable in any degree for that liability to mistake. * * * If any other part of the stamp, in configuration, collocation, or combination of words, figures or symbols, or in any other respect, contributed in any manner to deceive possible purchasers and enable the defendants to sell their

goods as those of the plaintiff, it should so have been found by the trial court."

To this construction of the finding, that confines the resemblance between the stamps entirely to the word "Rogers," excluding every other possible misleading similarity, I do not assent, because it entirely ignores the distinct finding that "the general resemblance between the stamps is such that a person knowing that of the plaintiff and not knowing that of the defendants might, upon referring to it, but not reading it attentively, mistake it for that of the plaintiff." This finding, and the construction I give it, are both emphasized by the fact that the trial court made the exhibits a part of the finding to be submitted for inspection and comparison by the judges of this court, surely not for the futile and foolish purpose of enabling us to see that the word "Rogers" in one stamp was like the word "Rogers" in the other, but that we might see how striking was the resemblance between the two stamps in their entirety, "*Rogers & Bro. A 1," and "C. Rogers & Bros. A 1," as actually impressed upon the metal in characters identical in style, size and space occupied,—making the closeness of the resemblance and the probable effect in misleading purchasers more apparent than would appear from any mere verbal description.

In order to illustrate the use and benefit of exhibits in questions of this kind, it may be allowable to compare the impression actually made by the star prefix of the plaintiff's stamp with the "C." of the defendants' stamp. As they appear on the printed page, nothing could well be more dissimilar, and yet such is not the fact as seen in the exhibits, for both consist of very small circular indentations in the metal, and owing to the small size the distinguishing points are obscure, so that as addressed to the eye upon casual or ordinary examination there is great similarity, even where we would not expect to find it.

But it is not my purpose to supplement the finding by adding my own inferences of fact. The exhibits, however,

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being legitimately before us as a part of the case, it was our duty to examine them.

For the purposes of this discussion, however, I have no occasion to use the exhibits for any other purpose than to aid the interpretation and to make more clear the purpose and meaning of that part of the finding, which in a measure seems to have escaped the attention of the majority of the court, notwithstanding the great thoroughness and ability of their argument. That the plaintiff has a good and very valuable trade-mark is beyond all question. As a property right it is as sacred as any other. The stamp adopted by the defendants to some extent operates to personate the plaintiff's and to mislead at least incautious and unwary purchasers. So that profits of right belonging to the plaintiff may fall into the hands of the defendants to whom they do not belong. For such a state of things there ought to be a remedy, and I think there is one founded upon the authority of numerous decisions, some of which were referred to by this court, with approval, in the late cases of *Williams v. Brooks*, 50 Conn., 278, and *Meriden Britannia Co. v. Parker*, 39 Conn., 450.

In *Williams v. Brooks* this court, remarking upon the finding that those liable to be deceived "were only careless and unwary purchasers," says (p. 283:)—"The purpose to be effected by this proceeding is not primarily to protect the consumer but to secure to the plaintiffs the profit to be derived from the sale of hair-pins of their manufacture to all who desire and intend to purchase them. It is a matter of common knowledge that many persons are in a greater or less degree careless and unwary in the matter of purchasing articles for their own use; but their patronage is not for that reason less profitable to the manufacturer; and when such persons have knowledge of the good qualities of the plaintiffs' hair-pins, and desire to purchase them, the law will not permit the defendants to mislead them." The court then quotes the following from the opinion of the court in *Singer v. Wilson*, L. R., 3 App. Cases, 376:—"There are multitudes who are ignorant and unwary, and

they should be regarded in considering the interests of traders who may be injured by their mistakes. If one man will use a name the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precaution that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs."

In *Meriden Britannia Co. v. Parker* it was found "that the stamp of the defendant, 'C. Rogers & Bros. A 1,' resembled the petitioners' trade-mark '1847 Rogers Bros. A 1,' to that degree that it was calculated to deceive unwary purchasers and those who buy such goods hastily and with but little examination of the trade-mark; but purchasers who read the entire trade-mark on the respondent's goods and who know the petitioners' trade-mark cannot be deceived, nor can they mistake the respondent's goods for those of the petitioners." 39 Conn. 455.

Upon the finding in that case the court remarked that "the fact that careful buyers, who scrutinize trade-marks closely, are not deceived, does not materially affect the question. It only shows that the injury is less, not that there is no injury." *Id.* 460.

But if the resemblance be found sufficient to mislead, as in the *Parker* case, it is still contended that as the defendants here only use their own partnership name, they may, upon the pleadings and finding in this case, lawfully appropriate to themselves the entire advantage which, in that case, was to be divided between themselves and *Parker*, and that this plaintiff must continue to suffer, without relief, all the damage from which the plaintiffs in that case were protected by injunction.

But in deciding this question of infringement the only difference between the case of one who uses a name, not his own, as a stamp, and one who uses his own name, is that, in favor of the owner of the stamp claimed to have been imitated and infringed, the former is presumed to

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use it for a fraudulent purpose, while, as to the latter, such purpose must be proved.

Here it is found that "the defendants, in commencing the manufacture of such articles, had in view the popularity in the market of such goods bearing a stamp containing the word Rogers, and one inducement to commencing such manufacture was the advantage they might derive from having their goods so stamped."

This is clearly sufficient for the plaintiff, unless the fact that such "popularity" was not the sole property of the plaintiff prevents the maintenance of this suit without joinder as co-plaintiffs of the other parties interested in the reputation and popularity which the defendants intended to appropriate.

That question arose in the case of *The William Rogers Manufacturing Co. v. The Rogers & Spurr Manufacturing Co.*, and was then disposed of by Judge LOWELL as follows: "It is further argued that the Rogerses are so many that the court cannot find any intent to appropriate the reputation of one of them more than another, and that if any suit will lie it must be by all those who use any trade-mark whose distinctive feature is the name 'Rogers.' I believe it to be true that the Greenfield Rogerses did not inquire, nor did the defendants care, whose reputation they were making available; but I am of opinion that any one of those who rightly use the name may enjoin the interfering use by others." 11 Fed. Reporter, 500.

That the plaintiff has built up the reputation and established the popularity in the markets of goods stamped with a stamp the conspicuous word of which is "Rogers," and is a principal, if not the sole owner of such reputation, is alleged and clearly found; also, that the defendants intended to appropriate the advantage to be derived from securing such reputation for their goods to their profit, and that this was an inducement to their commencing the business.

As was said by BAGGALLAY, L. J., in the *Thorley Cattle Food Case*, "I am satisfied on the whole transaction (as

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set forth in the finding) that the object was to obtain a large slice of the business previously carried on by the plaintiffs." L. R., 14 Ch. Div., 748.

But in our reasoning we are confronted with the proposition that, notwithstanding the positive findings of the court to which we have referred, the case of the plaintiffs, as set forth in the complaint, is so met and controlled by the negations in the finding as to prevent the plaintiff from obtaining any relief. The pleadings are reviewed somewhat briefly in the majority opinion, and the claim is made that the trial court has wholly negatived the allegations that the defendants were actually and intentionally fraudulent in the use of their stamp, and that in saying that the allegations of fraudulent design contained in article sixteen of the complaint are found not true, goes further, and negatives also the constructive fraudulent design implied in that article. But upon careful examination, the finding, when applied to the pleadings (the substance of which we have given) brings me to a different result.

The principal contention between the parties in their pleadings grows out of the allegations of positive fraudulent acts, or of constructive fraud, necessarily resulting from the acts set forth in paragraphs eleven to sixteen inclusive of the complaint. The defendants (without in terms denying the fraudulent intent and acts charged) aver that, as to those paragraphs, they have been engaged in, and are intending to carry on, the manufacture and sale, as set forth, "for the sole purpose of indicating that such articles are manufactured by them, and of availing themselves of the reputation which they (the defendants) have acquired in the markets, as before mentioned."

The affirmative allegations of the plaintiff are met by the affirmative counter and inconsistent averment of the defendants, thus creating an issue to be passed upon by the trier, who distinctly negatives the claim of the defendants by finding, in effect, that the "popularity which the defendants had in view," and from which they wished "to derive advantage," was not the "reputation which they

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(the defendants) had acquired in the markets in their business." The defendants' previous business is expressly found not to have included the manufacture of silver-plated spoons, forks and knives, stamped with the name "Rogers." On the contrary, this was the business found to have been established by the plaintiff and others, under whom the defendants do not claim.

In dissenting from the views of the majority of the court I do not find it necessary to hold that the fair and honest use of a name can be enjoined when it is used in the ordinary course of business in the way and manner in which other manufacturers of similar goods are accustomed to use their own names in the preparation and sale of goods, for I do not regard this as such a case. It belongs rather to the class of cases referred to by Judge LOWELL in the case before cited (11 Fed. Reporter, 495), where he says: "The books are full of cases in which defendants have been restrained from using their own names in a way to appropriate the good-will of a business already established by others of that name."

I think there was error in the judgment complained of.

If any decree of injunction was to be passed I would prefer to give it more careful consideration before fixing its precise terms. I will merely add that my impression is that the defendants should have been enjoined from such use of the combination of words, "C. Rogers & Bros.," on silver-plated knives, spoons and forks, and from such use of the word "Rogers" as part of any stamp or mark on the shank of silver-plated spoons and forks in connection with or without the suffix "A 1," as that purchasers will be liable to believe that spoons, forks and knives, so marked and made by the defendants, were made by the plaintiff.

In this opinion PARK, C. J., concurred.

53	169
60	542
53	169
77	410

THE SECURITY COMPANY *vs.* CHARLES M. HARDENBURGH
AND OTHERS.

A testatrix gave one half the residue of her estate to *M*, the wife of *C*, with a provision that if her husband should be indebted to the testatrix at the time of her death, her executor should transfer the indebtedness to *M* as a part of her share of the residue; and that if *M* should die before him the property given her should go to such of her children as should be alive at the time of the decease of the executrix, the share of any deceased child to go to its children, if any. Held—

1. That the gift to the children did not depend upon the contingency of *M*'s dying before the testatrix.
2. That *M* took a life estate during the life of her husband, with a vested remainder in her children liable to be defeated by her surviving her husband.
3. That the interests of the children should be protected by requiring security of *M* that the property should be forthcoming at her death, if she should not survive her husband.
4. That the notes of her husband for his indebtedness to the testatrix stood upon the same ground with the other property, as affecting the amount of the bond to be given.
5. That it was the duty of the executor to collect the interest on the notes as it fell due, and to keep all the property going to *M* under the bequest prudently invested, and to pay over the income to *M*.

A court of chancery has authority to protect remainder interests in property, and this authority is not affected by the statute (Gen. Statutes, p. 371, sec. 18,) which gives courts of probate power to require security in such cases.

[Argued June 3d—decided August 21st, 1885.]

SUIT for the construction of a will; brought to the Superior Court. The plaintiff is a trust corporation and executor of the will. Facts found and case reserved for advice. The case is fully stated in the opinion.

A. P. Hyde, for the plaintiffs and for the children of Mary L. Hardenburgh.

L. B. Morris, for Charles M. and Mary L. Hardenburgh.

CARPENTER, J. The questions in this case depend upon the construction of the following paragraph in the will of Mary Collis Lee: "I give, devise and bequeath unto Mary

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Lee Hardenburgh, wife of Charles M. Hardenburgh, of the city of Minneapolis, state of Minnesota, the one half part of the residue of my estate, be the same real, personal or mixed ; and if Charles M. Hardenburgh, her husband, is indebted to me in any sum whatever at the time of my decease, I hereby direct that my executor hereinafter named shall transfer the whole of any such indebtedness to Mary Lee Hardenburgh, to be by her received on account of the one half part of the residue of my estate hereinbefore devised to her. And should Mary Lee Hardenburgh die before her husband, the said Charles M. Hardenburgh, then I give, devise and bequeath the aforesaid one half of the residue herein devised to said Mary Lee Hardenburgh, upon her death to such of her children as shall be alive at the time of my decease, share and share alike ; and if any child or children of Mary Lee Hardenburgh shall have died at the time of my decease, leaving lawful issue, then I give, devise and bequeath to such lawful issue the share or shares which such deceased child or children would have taken if living at the time of my death."

The property is personal estate. Mr. and Mrs. Hardenburgh are residing in the state of Minnesota and have several minor children. Mrs. Hardenburgh is a person of insufficient pecuniary means to answer to the executor or to the persons in remainder for the one half of the residue bequeathed to her in case she should die before her husband.

The first question is—what estate does Mrs. Hardenburgh take? The counsel for the defendants claim that it is an absolute fee. That involves the necessity of claiming that the provision for her children, in the event of her dying before her husband does, is void. It is hardly necessary to say that a construction requiring us to hold that any portion of the will is inoperative is to be avoided, and that such a construction should be adopted as will give effect to all parts of the will so far as they are consistent with the rules of law. The contingent provision for the children is a reasonable and proper one, so far as we can see, and we are not aware that it contravenes any legal principle. We cannot

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therefore hold that it is void, but must hold that Mrs. Hardenburgh did not take an absolute estate. We think that it was clearly the intention of the testatrix to give her an estate which should be absolute ultimately in case she should survive her husband ; and in case her husband survives her, the intention seems to be equally clear that she should have but a life estate, and that, at her death, the property should go to her children. In that event the children would take, not as her heirs, but as purchasers under the will.

It is suggested that the ruling intention of the testatrix was to give the property to the sole and separate use of Mrs. Hardenburgh, so that her husband could not control it, and in such a manner that he could not in any event have any interest in it. That may have been the motive which induced her in a certain contingency to give the property to the children ; but that motive cannot affect the construction of the plain language of the will. It is still true that she gave the children an interest in the property. Her intention to do so is of more importance than the motive which prompted it. As both the intention and motive are legal, it is the duty of the court to give effect to the intention.

The respective interests of Mrs. Hardenburgh and her children must be considered relatively, as they together constitute but one estate. If Mrs. Hardenburgh takes a defeasible fee, then the children take a contingent remainder, depending upon an event which may never happen. If she takes a life estate, the fee being contingent, then the children take a vested remainder, defeasible upon the happening of the contingency.

Whichever view is taken, the children have or may have an interest which should be protected. The power of a court of equity to protect it is not of statutory origin. In 1865 (Session Laws of that year, p. 74) an act was passed authorizing the court of probate, in all cases, upon the request of the life-tenant, to order the executor to deliver the property to him upon his giving bonds that it should be forthcoming for the remainder-man at the termination of the life estate. Gen. Statutes, p. 371. The authority thus

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conferred upon the court of probate is independent of, and in no way interferes with, the general chancery powers of a court of equity. Such powers were exercised in cases where there was danger that the remainder might be lost prior to the passage of the act. *Hudson v. Wadsworth*, 8 Conn., 348; *Langworthy and wife v. Chadwick*, 13 Conn., 42. And it has been exercised since the passage of the act. *Clarke v. Terry*, 34 Conn., 176.

Nor is the remainder without the pale of equitable protection by means of its contingent character. In *Hudson v. Wadsworth* real estate held in fee-tail was sold by order of the legislature. When the tenant in tail became of age he claimed the possession and control of the funds. His claim was denied, unless he should give bonds that the funds should be forthcoming in case he should die without issue. In *Clarke v. Terry* the interest protected was a contingent one. But if any question can possibly arise in this regard it may be effectually put to rest by regarding Mrs. Hardenburgh's interest as a life estate, with a vested remainder in the children, defeasible by the death of her husband before her own. Indeed that seems to us the better view, because at present she has but a life estate, and by the express terms of the will she cannot have a fee unless she survives her husband. Until then her rights in and power over the property are simply those of a life-tenant. This construction gives effect to all the provisions of the will and effectually protects all interests created by it.

The counsel for Mrs. Hardenburgh, in support of the claim that she takes a fee, cite *Landon v. Moore*, 45 Conn., 422. But that case is distinguishable from this. In that two things were reasonably certain—1st, that the testator intended to give his daughter a fee simple; 2, that he intended to exclude her husband from any marital rights in the property devised. The language of the will clearly expressed both intentions. The doubt arose from the fact that the testator, out of abundant caution, in order to make clear his intention, added, "at her death to go immediately to her children, if she have children at that time." This lan-

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guage was satisfied and effect given to the whole will by holding that the devisee took a fee to her sole and separate use, and that the language quoted did not reduce it to a life estate. In this case the intent to make a contingent provision for the children cannot be ignored. It is express, and in case the event happens it is as clear as the intent in favor of the mother.

It is further contended that the gift to the children depends upon the further contingency that Mrs. Hardenburgh should die during the life-time of the testatrix. The argument in support of this claim is drawn from the fact that the gift over is not to the children generally, but is limited to those living at the decease of the testatrix and the issue of those who had then deceased. We do not think that the implication from this circumstance is sufficient to justify us in construing the will as containing such a condition. The will itself makes the gift to depend, in express terms, upon the death of Mrs. Hardenburgh while her husband is yet living, without further qualification as to time. We may or may not be able to discover a motive for excluding after-born children, but we think it reasonably certain that if she had intended that the gift over should take effect only in case Mrs. Hardenburgh should die during her life-time, she would have said so in less ambiguous terms. It is at least an obscure and awkward way of expressing such an intention. On the other hand, this fact is important in another view; it shows satisfactorily, if not conclusively, that the testatrix intended that the children should take as legatees, and not as heirs of their mother.

A large portion of the property distributed to Mrs. Hardenburgh consists of indebtedness due from her husband to the estate. In respect to such indebtedness one clause of the paragraph we have quoted directs the executor to transfer it to Mrs. Hardenburgh, to be received by her on account of the one half part devised to her. The defendants contend that no bond should be required based on that portion of the estate represented by this indebtedness. This claim assumes that such was the intention of the testatrix. The

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principal, if not the sole evidence of such an intention, consists of the fact that the executor was directed to transfer such indebtedness. We hardly think that is sufficient. The fair meaning of the will is, that she should receive the notes, which were evidence of such indebtedness, towards her portion of the estate; and the direction that the executor transfer the same is fully complied with by his indorsing the notes when they are legally delivered to her. That seems to have been the practical construction put upon it by the judge of probate, for the notes were in fact included in the distribution. No other reason is shown why these notes should not stand upon the same footing as the other property.

The complainant asks the court to instruct the executor whether it is its duty to collect the interest as it becomes due on Mr. Hardenburgh's notes. This matter is involved and practically disposed of in the point just considered. We are unable to see why it is not the duty of the executor to collect and pay over the interest on these notes as well as on other securities.

The Superior Court is advised that Mrs. Hardenburgh during the life of her husband takes a life estate only, with a fee contingent upon her surviving him; that she is not entitled to the property or any portion of it except upon giving satisfactory bonds to an amount equal to the value of the property that it shall be forthcoming at her death if she does not survive her husband; and that in the meantime it is the duty of the executor to keep all the property going to her under the bequest prudently invested, and to collect the income as it falls due and pay it over to her.

In this opinion the other judges concurred.

HENRY TUTTLE vs. SAMUEL H. ARMSTEAD.

The plaintiff, as conservator, borrowed \$600 of *T.*, to use for the benefit of the ward, and mortgaged the real estate of the ward to *T.* as security. The ward afterwards died, and his heirs sold the land to the defendant for \$1,000, of which he paid \$400 in cash, and agreed to pay the remaining \$600 by paying the debt of that amount to *T.* The defendant paid the interest on the debt to *T.* annually for five years, when it was discovered that the mortgage was invalid, and he refused to make further payment on the debt, and the plaintiff, as maker of the mortgage note, was compelled to pay it. The heirs, grantors of the defendant, then assigned to the plaintiff their claim on the defendant for the \$600 of the purchase money not paid. Held that the heirs had a valid claim on the defendant for this sum, and that the plaintiff, as their assignee, could recover it.

More than six years had elapsed, after the agreement of the defendant to pay the mortgage note, before the bringing of the suit. Held that his payment of interest on the note prevented the running of the statute of limitations against the claim.

The plaintiff had also a good cause of action in his own right. Upon the facts stated the debt to *T.* had become the defendant's debt. When, therefore, the plaintiff, as maker of the note, was compelled to pay it, he was in law paying money for the defendant's benefit at his request.

A promise to pay a mortgage is a promise to pay the mortgage debt.

A parol promise to pay the debt of a third person, to bring it within the statute of frauds, must be a promise to pay the promisor's own money.

A promise to pay such a debt with the promisee's money in his hands is not within the statute.

[Argued June 4th—decided June 26th, 1885.]

ACTION by the plaintiff as assignee of Solon B. Perkins and others, grantors of the defendant, for the non-performance by the latter of a promise to pay a mortgage debt supposed to be a charge on the land conveyed; brought to the Court of Common Pleas, and tried to the court before *Torrance, J.* The defendant in his answer set up, among other things, the statute of limitations. The following facts were found by the court.

On the 30th of April, 1877, Solon B. Perkins, Ellen A. Wilcox and Watson T. Perkins, being all of the children and heirs at law of Lewis Perkins deceased, sold and conveyed to the defendant by a warranty deed certain land

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which came to the grantors by descent from said Lewis. The agreed price of the land was one thousand dollars.

There was at the time a supposed mortgage upon the land for the sum of six hundred dollars. This mortgage had been given by the plaintiff, who was then conservator of said Lewis, as security for money borrowed by the conservator, to be expended in his support, and which was all so expended by him. At the time the grantors in the deed to the defendant, and the defendant himself, believed the mortgage to be valid, and it was agreed that the purchase price of one thousand dollars should be paid as follows, to wit: four hundred dollars in cash, and six hundred dollars by the assumption and payment of the mortgage. The defendant immediately entered into possession of the premises, and has occupied them exclusively as owner ever since.

From the 30th day of April, 1877, down to the 21st day of July, 1882, the defendant paid the interest on the note described in the mortgage deed, and to secure which the mortgage was given, and no demand up to the last date had been made on him to pay the principal or any part of it.

The mortgage was afterwards, in 1883, in a proceeding brought for that purpose, decreed by the Court of Common Pleas for New Haven County to be of no effect, which decree is still in force, and cannot now be appealed from.

The defendant has never paid the mortgage debt nor any part of it, nor any part of the six hundred dollars, part of the purchase money, and has paid only four hundred dollars of the agreed purchase price for the land.

On the 12th of November, 1883, Solon B. Perkins, Ellen A. Wilcox and Watson T. Perkins, grantors of the defendant, made a valid assignment to the plaintiff of their claim against the defendant for the six hundred dollars.

At divers times between the 30th day of April, 1877, and July 21st, 1882, and within six years of the time of bringing this suit, the defendant has acknowledged to divers persons that he owed the sum of six hundred dollars on the land, and once in the presence of the plaintiff, about one year before the bringing of this suit, he stated that he owed the six hundred dollars.

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The said grantors never made any demand upon the defendant prior to the assignment of their claim, to pay the six hundred dollars or any part of it. Immediately after the assignment the plaintiff demanded the six hundred dollars of the defendant, and he refused to pay it.

Since the time of the purchase of the premises in April, 1877, the defendant has had no communication, oral or written, with the grantors respecting the balance of the purchase money, nor had he within six years prior to the time of bringing this suit acknowledged the indebtedness or promised to pay the same, otherwise than as here stated.

Upon the trial of the cause the plaintiff offered to prove that at the time the defendant bargained for the premises, he orally promised to assume and pay the mortgage of six hundred dollars, as part of the agreed purchase price. To this the defendant objected, on the ground that it was inadmissible under the statute of frauds, but the court admitted the testimony, the defendant excepting. The plaintiff also offered evidence to show that, when he was appointed conservator of Lewis Perkins, he found it necessary to borrow six hundred dollars for the care and support of his ward, and gave therefor the note and mortgage mentioned, and expended the money for the benefit of his ward, and offered in evidence a copy of part of his conservator's account to show, in connection with his testimony, how the money had been expended. He also testified that the note had been paid by him and he had never been reimbursed.

All of this evidence was objected to by the defendant, but the court admitted it, subject to the objection, and did not subsequently rule upon it one way or the other.

The defendant claimed:—1. That the statute of limitations was a bar to the plaintiff's recovery. 2. That the evidence objected to was inadmissible. 3. That a parol promise by the defendant to pay the supposed mortgage could not be enforced. 4. That upon the facts as they appeared upon the record the plaintiff was not entitled to recover. But the court overruled these claims and rendered judgment for the plaintiff in the sum of six hundred

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and sixty-six dollars. The defendant appealed to this court.

J. W. Alling and J. H. Webb, for the appellant.

W. C. Case and C. R. Whedon, for the appellee.

PARK, C. J. In the month of January, 1875, the plaintiff, as conservator of one Lewis Perkins, borrowed of one Lucius Tuttle the sum of six hundred dollars, to be expended in the support and maintenance of his ward, and the money was so expended. The plaintiff executed to Tuttle a mortgage of the real estate of the ward to secure the note given for the loan. Subsequently Perkins, the ward, died, and his heirs sold the real estate so mortgaged to the defendant for the sum of one thousand dollars. The defendant expressly assumed and agreed to pay the mortgage debt, and four hundred dollars of the purchase money was all that he paid to the grantors. The defendant paid Tuttle the interest on the mortgage note regularly, as it became due, from the month of April, 1877, down to the month of July, 1882, when it was discovered that the mortgage was invalid, and furnished no security for the note. Thereupon the defendant refused to pay the note, or pay any longer the interest on it, and wholly refused to carry out his agreement with the grantors in respect to it. Subsequently the plaintiff paid the note, as he was under the necessity of doing as the maker of it, and took from the grantors an assignment of all their rights against the defendant under the contract of sale. When the contract was made both parties believed that the mortgage was valid, and acted upon that belief in making the agreement.

These are the principal facts of the case, and enough to sustain the judgment of the court below in favor of the plaintiff.

The heirs of Perkins were the owners of the property sold to the defendant. They sold the property to him for the sum of one thousand dollars. They gave him a deed

under this contract of sale, and the defendant went into possession.

But the controversy in the case grows out of the manner in which it was agreed that payment should be made. The grantors virtually said to the defendant,—pay six hundred dollars of the purchase money to Lucius Tuttle, who loaned that sum for the benefit of our father, and the payment shall be payment to us of that amount. The defendant promised to do so, but has never performed his promise farther than to pay the interest on that amount to Tuttle from 1877, when the agreement was made, down to the month of July in the year 1882, when the defendant refused to pay any further sums to Tuttle under the agreement, on the ground that the mortgage was invalid and the agreement void by the statute of frauds; it being an agreement, it is said, to pay the debt of a third person in which the grantors had no interest.

But how does this claim benefit the defendant? Suppose he was not bound to pay Tuttle; what then? The amount he paid him was virtually paid on his debt to the grantors. He owed Tuttle nothing independently of his agreement to pay him six hundred dollars of the debt he was owing them. Hence the sums he paid Tuttle he, in effect, paid the grantors, and the sums he left unpaid to Tuttle he left unpaid to them, and their claim against him to that amount remained due. He owed six hundred dollars, and was bound to pay it, either directly to the grantors, or indirectly to them by paying the amount to Tuttle. Payment to either would cancel his indebtedness to the grantors.

But the defendant claims that between the statute of frauds and the statute of limitations he can escape payment. He insists that the statute of frauds protects him against payment to Tuttle, and the statute of limitations against payment to the grantors, and equally against payment to the plaintiff, as having no greater rights than they had when they assigned their claim to him. Let us examine this claim.

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The defendant paid interest on the six hundred dollars to Tuttle, under the agreement, down to the month of July, 1882. This suit was brought in the month of November, 1883. But he claims that he paid the interest under the belief that there was a valid mortgage on the property conveyed to him in favor of Tuttle, and to prevent a foreclosure of the property. But there is no finding to sustain this claim. All the finding on the subject is as follows:—"At the time of the bargain for the sale of the land the grantors in the deed and the defendant believed the mortgage to be valid, and thereupon it was agreed that the purchase price of one thousand dollars should be paid as follows, to wit: four hundred dollars in cash to the grantors in the deed, and six hundred dollars by the assumption and payment of the mortgage." The finding then goes on to state that the deed was delivered to the defendant; that he went into possession of the property conveyed thereby; that he paid four hundred dollars to the grantors according to the agreement; and that from this time down to the month of July, 1882, he regularly paid the interest on the six hundred dollar mortgage note to Tuttle. What room is there here for the claim that the defendant paid the interest on his own private account to prevent a foreclosure of the land which he purchased? The plain import of the finding is, that the defendant paid the interest on the six hundred dollars of the purchase money which he agreed to pay to Tuttle, and paid it because he assumed that obligation in the contract of sale. The defendant's indebtedness was to the grantors in the deed, as we have seen. He could pay the amount by paying it to Tuttle under the agreement. The case is like this. *A* owes *B* six hundred dollars. *B* says to *A*, pay the amount to *C*. *A* may be under no legal obligation to pay *C*, although he may agree to do it. But if he pays three hundred dollars to *C*, *A* thereby cancels his indebtedness to *B* to that amount; but he still owes *B* the remaining three hundred dollars. So here, as fast as the defendant paid Tuttle under the contract of sale, either principal or interest on the mortgage

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note, he thereby canceled his indebtedness to the grantors *pro tanto*.

It follows then that the interest paid by the defendant to Tuttle was virtually paid on the defendant's indebtedness to the grantors, and this prevented the running of the statute of limitations on their claim against the defendant.

And it is very clear that the parol promise of the defendant to pay the mortgage debt to Tuttle was not void under the statute of frauds, as being a parol promise to pay the debt of a third person. The six hundred dollars with which the debt was to be paid was the property of the grantors, and a promise to pay their money to any person to whom they wished it paid would not be within the statute of frauds. That statute applies to promises to pay the promisor's own money, not the money of another in his hands.

The defendant further claims that the contract of sale was, in effect, a contract of purchase of the equity of redemption; that the equity was considered to be worth the sum of four hundred dollars; that he paid that sum to the grantors, and thus fulfilled his obligation to them.

This claim is unsupported by the finding, which upon this point is as follows:—"The agreed price of the land was one thousand dollars. * * * The agreed price was to be paid as follows, to wit: four hundred dollars in cash to the grantors and six hundred dollars by the assumption and payment of said mortgage." A mortgage is a mere security of some debt or obligation assumed by another. Standing alone it is of no value. The debt or obligation undertaken is the principal thing; and when the finding says that "the defendant assumed and agreed to pay the mortgage," the import of the language is that he assumed and agreed to pay the mortgage debt. Although the mortgage in this case proved to be void, and no incumbrance upon the property, still the mortgage debt, which the defendant assumed and agreed to pay, remained and was valid.

We have then this finding, which says that six hundred

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dollars of the agreed price of the land was to be paid by the defendant's assumption and payment of the mortgage debt. Paid to whom? Payment implies the existence of a debt, of a party to whom it is owed, and of a satisfaction of the debt to that party. This finding, fully expressed in words, would read as follows:—Six hundred dollars of the agreed price of the land was to be paid the grantors by the defendant's assumption and payment of the mortgage debt. Would the grantors be paid the six hundred dollars without the defendant's assumption and payment of the mortgage debt? The answer is unnecessary.

The plaintiff's right to recover on the grounds we have stated must rest upon the assignment to him of the claim of the heirs, grantors of the defendant, to whom he promised to pay the mortgage debt.

But there is another clear ground on which the plaintiff would be entitled to recover in his own right, if the complaint had been properly framed for such a recovery, and which it may be worth while to state. The defendant, being allowed in his payment for the land conveyed to him the six hundred dollars due to the mortgagee, came under an implied obligation to pay him the six hundred dollars and save the estate of Perkins, the ward, from paying it, the estate being clearly liable to the conservator for it. Beyond this, he expressly agreed to pay it. It became therefore his debt. When afterwards the plaintiff was compelled as maker of the mortgage note to pay it, he was paying money for the defendant's benefit, and in law at his request, and of course could recover it in an action for money paid. This would have been the simplest ground to place the case upon, but that adopted by the counsel for the plaintiff is sufficient.

There is no error in the judgment.

In this opinion the other judges concurred; except STODDARD, J., who dissented.

JOHN W. WEBSTER, TRUSTEE, *vs.* OLIVER WELTON AND
OTHERS.

A testator gave property in trust, to be paid over at a time fixed as follows: "To my grandchildren, children of my son *N*, or to such of them as shall be living, to be equally divided between them." *N* had then four children, but a fifth was born before the time fixed for the distribution of the trust property. Held that the children of *N* took as a class, and that the after-born child was entitled to share with the others.

An earlier clause of the will gave \$5,000 each "to my grandchildren, *O*, *A*, *W* and *E*, children of my son *N*." Held not to be a sufficient reason for giving a construction to the later clause above mentioned, limiting its application to the four children of *N* living at the testator's death.

[Argued June 4th—decided June 26th, 1885.]

SUIT for advice as to the construction of a will; brought to the Superior Court. Facts found and case reserved for advice. The case is fully stated in the opinion.

J. W. Webster, for the plaintiff, and for Maud A. Welton, one of the defendants.

L. B. Morris, for Oliver Welton, Walter S. Welton, Andrew N. Welton and Esther L. Butler.

STODDARD, J. Maud A. Welton, a child of Noah B. Welton, and grandchild of the testator Arad W. Welton, claims as legatee under the ninth clause of her grandfather's will. This claim is contested by all the other children of Noah B. Welton.

By his will the testator, after making certain bequests, creates a trust, embracing the residuary estate, and in the ninth clause of the will he provides as follows:—"On the first day of July, 1885, or as soon after that time as is practicable, I order and direct my said trustees to divide and pay over the principal sum of said trust fund in manner and portions as follows, * * * * and to my grandchildren, children of my said son Noah B. Welton, or to such of them as shall at that time be living, and to be equally divided between them, one fifth part."

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The will was made March 15th, 1870, and the testator died March 15th, 1871.

At the time the will was made Noah B. Welton was married and had the four children, and no other, who are named in the fifth clause of the will, and who are contesting the claim of Maud.

About the 8th day of January, 1878, the wife of Noah B. Welton was divorced from him, and he married again about January 22d, 1879, and of this second wife Maud A. was born December 19th, 1879.

The testator gives the legacy in question to a class, that is, to his grandchildren, children of his son Noah B. Welton. Under a similar provision this court has very recently held that children born after the death of the testator take equally with children living at his death. *Jones's Appeal from Probate*, 48 Conn., 67. This rule has "nearly universal application, with hardly a dissenting authority," and controls the case at bar, unless a different disposing intent can be discovered in other parts of the will. And in this behalf it is urged on the part of the children living at the testator's death, that the testator has, by the terms of his will, expressed an intent that this nearly universal rule shall not govern the disposition of this legacy, for the fifth section of the will gives a legacy to each of the four children living at the testator's death in terms as follows:—"I give and bequeath to my grandchildren Oliver, Andrew, Walter and Esther, children of my son Noah B. Welton, five thousand dollars each;" and the argument is, that as the testator in the fifth clause of the will gives specific legacies to these particular persons by their individual names, and in connection with such gift describes them as "my grandchildren, children of my son Noah B. Welton," therefore the ninth clause of the will, which contains the same words of general or class description, "grandchildren, children of my son Noah B. Welton," must receive the same restricted construction as to the persons taking thereunder, notwithstanding the omission to individualize therein. This course of reasoning is not persuasive, and there are at least two substantial considerations antagonistic

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to this view. One is, that it is not lightly to be assumed that the testator intended to disinherit one grandchild while making all others, members of the same class, recipients of his bounty. Another reason is to be drawn from the form of the will itself. The will is drawn with technical nicety, disposes of a considerable estate by a variety of trust and other provisions, and provides for possible contingencies, indicating both care and capacity to express the precise intent of the testator in apt and full terms. Language thus used should have its natural and legal meaning; and the very fact that the testator uses in different clauses of this will different phraseology to express his intent, prompts the belief that such use was intentional, and made in order to produce different results in view of future possibilities.

Besides, the fifth clause does not contain a class gift; the legacies therein are personal; separate legacies to particular persons. While the legacy in the ninth clause is by its terms a class gift, the testator was obviously certain as to what particular persons would take under the fifth clause, and uncertain under the ninth clause, and expressed himself accordingly. This view is not weakened by suggesting that the testator contemplated the possible death of some of the living grandchildren, for he might with equal reason have contemplated the birth of others, and there is nothing in the general scope of the will, nor in any particular clause or combination of clauses, to indicate an intent to exclude any of his grandchildren, children of his son Noah, from the benefits of this legacy.

We see nothing to take this case from the operation of the general rule, and advise the Superior Court that Maud A. Welton takes under the ninth clause of the will equally with each of the other children of Noah B. Welton.

In this opinion the other judges concurred.

JOHN CROGAN AND WIFE *vs.* LOUIS SCHIELE.

The defendant owned a factory set back ten feet from the line of a city street, and running along the street eighty-eight feet, with the space in front paved like the adjoining sidewalk and of the same grade. In front of the factory was a porch extending a little way towards the street, with a door in it, used as the main entrance, and by the side of the porch a depressed area extending along the building, about ten feet long, three feet wide and five deep, with no railing to protect persons from falling in. The plaintiff on a lawful errand undertook to go in the evening from the street to the porch, and, without want of care, fell into the open area and was injured. Held that the defendant was liable.

Where a person has so made the way leading to a building on his premises as to invite people to pass along the way to such building, he is bound to keep the way clear of dangers.

And it is not necessary in such a case that the person using the way should be a traveler on the highway.

And where the owner of a building near a street line throws open the intervening space to public use, and by paving it like the adjacent sidewalk invites the public to use it as a part of the sidewalk, he is bound to keep the space so offered for public use free from dangers.

Where a cause of danger to public travel exists on private land adjoining a public highway, the liability of the owner of the land for an injury from it depends on its dangerous character with reference to public travel rather than its exact location.

The question whether it endangers public travel is, as a general rule, one of fact and not of law.

Upon a hearing in damages upon a demurrer overruled, in a suit for an injury by the defendant's negligence, the admission of the demurrer exhausts itself in conclusively establishing the defendant's liability for some damages and casting upon him the burden of proof as to the absence of negligence. He does not go into this inquiry weighted with the admission, and is not under the necessity of proving his case by more than a preponderance of evidence.

[Argued June 10th—decided July 3d, 1885.]

ACTION for an injury by reason of the negligence of the defendant; brought to the Superior Court.

The first count of the complaint alleged that the defendant, on the 17th day of November, 1883, was the possessor and occupier of certain premises with the appurtenances situate in the city of New Haven, adjoining a certain public highway in said city known as Franklin street, and kept,

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maintained and permitted to remain on said premises, substantially adjoining said public highway and so near the public footway of said highway as to make the use of the same unsafe and dangerous, a deep area or pit, without rail, cover or guard of any kind; and that on said day and in the night time thereof, the plaintiff Sarah M. Crogan was passing along said public footway of said highway, and by reason of the existence of said area or pit and for want of proper rail, cover or guard to the same, she, although being in the exercise of due care, passed from said highway and slipped and fell into the said area or pit. And that thereby the head and body of the plaintiff were bruised and wrenched, and her foot lacerated and broken, and permanently disabled, and she suffered great pain, and has been forced to lay out and expend large sums of money in endeavoring to be healed, to wit, \$200.

The second count alleged that, at the time when the plaintiff suffered the injuries described and for a long time previous thereto, the defendant kept and maintained upon his said land between the public footway or pavement on said Franklin street and said pit or area, a brick pavement or footway in all respects like the public pavement or footway, separated in no manner therefrom, and invited, licensed and permitted the public to make use of the same in the same manner and to the same extent that they made use of the public way, from which it was in no manner to be distinguished by the eye. And that on the 17th day of November, 1883, and in the evening of said day, the plaintiff Sarah M. Crogan was passing along said public way, and from the said public way passed over and upon the said brick pavement of the defendant, and by reason of the existence of the same and of said area or pit, and the want of any rail, cover or guard and of any light or warning, she, being in the exercise of due care, slipped and fell into said area or pit.

The defendant demurred to the complaint, the demurrer was overruled, and the case heard in damages before *Beardsley, J.* The court made the following finding of facts:

The defendant at the time of the injury complained of was the owner and in possession of a factory, eighty-eight feet long, built on his own land, parallel to and on the west side of Franklin street, in the city of New Haven, and ten feet distant from the westerly line of the street. The factory was erected by a former owner fifteen years before the time of the injury, and from the time of its erection to the present time the space between the front wall of the factory and the sidewalk of the street was enclosed by fences leading out from the ends of the factory direct to the sidewalk, but was otherwise open. The line of the sidewalk was, at the time of the accident, and had been, as against the adjacent lots, marked by the customary fences of owners adjoining the street.

Originally the building was used as a carriage shop, but it has been used by the defendant as a corset shop. Some three or four years ago the open space between the factory and sidewalk was paved with brick, on the same grade as that of the brick sidewalk.

The general course of the sidewalk from beyond each end of the defendant's lot, and the front fence lines of the adjoining owners, would indicate to the ordinary traveler the general line and course of the sidewalk along the defendant's lot, though there was nothing to mark the exact line of the separation between the sidewalk and the defendant's lot.

Near the north end of the factory and on the front side and next to it, there was and is an area, built when the building was erected, and ever since maintained, ten feet nine inches in length, two feet nine inches wide, and five feet four inches deep; the outer edge of which was seven feet and two inches from the line of the sidewalk.

This area was built, maintained and used for the purpose of letting in light through two windows into the basement of the factory. It was not used as a means of access to the factory.

The principal entrance to the factory was through a door built in the front of a wooden porch, painted in a light drab color, extending from the factory towards the street about a

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foot and a half beyond the outer line of the area. The upper line of the porch was two feet from the south edge of the area. A street gas lamp stood on the same side of Franklin street, opposite to a point a little below the south end of the factory. The upper and outer edge of the area was on the same grade as that of the open space in front of the factory. The area was open and without rail or guard.

At the time of the accident the office of the factory was on the first story, and the office window was over the area. A gas light, turned low, was accustomed to burn in the office all night, and was burning at the time of the accident, but the shades of the windows were drawn within six inches of the bottom of it and did not light up the area, which was too far below the window for the light to strike it, but it did show the wooden porch. The street gas light at night would light up and show the wooden porch, though a portion of the area would be in the shade of the porch.

The factory was accustomed to shut down and close, and did shut down and close at the time of the accident, at six o'clock in the evening.

The plaintiff Mrs. Crogan resided in Collis street, a street leading into Franklin street, nearly opposite the south end of the factory. Her residence was on the north side of Collis street, in the second house, and only a few feet from the corner of Collis and Franklin streets.

The accident happened on the 17th day of November, 1888, at about eight o'clock in the evening.

Mrs. Crogan was engaged in writing a letter at her house, when she was informed that her son Joseph, then about nine years of age, was in the defendant's shop, sweeping with one Tony, a son of the defendant's janitor. She immediately dropped her pen and went out of her house to get her boy and bring him home. She went along the Collis street sidewalk to the corner of Franklin street, and then she took a direct line towards and to the wooden porch of the factory, crossing Franklin street diagonally. When she reached the porch she missed the door knob, and in stepping around to find it she fell into the area and was considerably hurt, sus-

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taining actual damage to the amount of \$900, including a bill of \$128 for medical services incurred by reason of the injuries she so received.

While such an object as the porch was visible, yet it was not light enough for a person so unfamiliar with the premises as Mrs. Crogan was to discern the door, and she had not previously noticed the existence of the area and was not negligent in fact in not discovering and avoiding it.

The boy Joseph was in fact in the factory at the time the plaintiff, his mother, went to look him up. The defendant's janitor was also in the factory at the time, but neither the defendant nor any other person in his employ. Joseph had no right, authority or license from the defendant to be in the factory at that time.

The defendant claimed:

1. That as at the time of the injury Mrs. Crogan was not in the exercise of any rights as a traveler upon a highway, but was upon the defendant's premises, seeking to find the door to his factory, there was a substantial variance in these facts from those alleged in the complaint, and that the plaintiffs could only recover nominal damages.

2. That the facts showed that Mrs. Crogan, at the time of the accident, was upon the premises of the defendant as a trespasser, and not by his license or authority express or implied, and that upon the facts of the case the defendant owed no duty to her to have said area protected by rail or guard.

3. That upon the facts of the case the plaintiffs were entitled to only nominal damages.

The court ruled in accordance with these claims of the defendant, and rendered judgment for nominal damages only. The plaintiffs appealed to this court.

T. E. Doolittle and W. L. Bennett, for the appellants.

1. A person who makes an excavation on his own land so near the highway as to render the use of the way dangerous, is liable in damages to one who, in the lawful use of the way and in the exercise of due care, falls into the excavation and

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is injured. *Buesching v. St. Louis Gaslight Co.*, 73 Misso., 219; *Temperance Hall Asso. v. Giles*, 33 N. Jer. Law, 260; *Beck v. Carter*, 68 N. York, 284; *Jarvis v. Dean*, 8 Bing., 447; *Barnes v. Ward*, 2 Car. & K., 661; *Beardsley v. City of Hartford*, 50 Conn., 539; *City of Norwich v. Breed*, 30 id., 535. The liability of a person making such an excavation does not depend upon its distance from the street line, but upon its dangerous condition. *City of Norwich v. Breed*, (*supra*); *Beck v. Carter*, (*supra*); *Balt. & Ohio R. R. Co. v. Boteler*, 38 Maryl., 568. The danger is that persons approaching his premises upon lawful errands may, without being aware of it, pass from the sidewalk into the pit.

2. The plaintiff was not a trespasser in going upon the defendant's premises. 2 *Waterman on Trespass*, § 782; *Lakin v. Ames*, 10 Cush., 198. Moreover, by leaving the strip of land so open to the public for fifteen years, the defendant at least licensed the public to use it. And more than this, by the arrangement of the sidewalk and entrance to his factory he "held out an allurements whereby the plaintiff was induced to come upon the place in question." *Corby v. Hill*, 4 Com. B. (N. S.) 556. In this case the plaintiff was a visitor making use of a private way. See also *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 373; *Larue v. Farren Hotel Co.*, 116 Mass., 67; *Learoyd v. Godfrey*, 138 id., 315; *Stratton v. Staples*, 59 Maine, 94; *Low v. Grand Trunk R. R. Co.* 72 id., 313; *Bennett v. Railroad Co.*, 102 U. S. Reps., 577.

3. But the plaintiff might be a technical trespasser and yet be without fault. And in such a case the fact is no protection to a party guilty, as here, of gross negligence. *Birge v. Gardiner*, 19 Conn., 507; *Young v. Harvey*, 16 Ind., 314; *Hydraulic Works Co. v. Orr*, 88 Penn. St., 332; *Beck v. Carter*, (*supra*); *Railroad Co. v. Stout*, 17 Wall., 657.

4. If the plaintiff was merely entering upon the defendant's premises by his invitation or license and was not in the use of the highway as such, there is no variance between the finding and the allegations of the second count, so that there can be a recovery on that count.

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J. W. Alling and H. W. Asher, for the appellees.

1. It is clear from the finding that the plaintiff was not a traveler upon the highway and did not suppose herself to be, but that she had passed across the highway to go to the defendant's factory, and had gone from the sidewalk upon the defendant's premises, and that she fell into the open area near the porch while trying to find the handle of the door. It may have been lawful for her to do what she did, but the defendant cannot be liable upon the facts alleged in the complaint, and as the case stands can be liable only for nominal damages. *Shepard v. New Haven & Northampton Co.*, 45 Conn., 54; *Sykes v. Town of Pawlet*, 43 Verm., 446; *Hounsell v. Smith*, 7 Com. B. (N. S.,) 731, 742.

2. But the plaintiff could not recover upon the facts even if the complaint had been properly framed. She was in the circumstances a trespasser, to whom the defendant owed no duty. It was in the night, when the factory was closed, and the defendant cannot be regarded as inviting people to his factory at such a time. The plaintiff was a stranger to the premises, and in going upon them in the night took her own risk. *Fox v. Town of Glastonbury*, 29 Conn., 204, 209; *Bush v. Brainard*, 1 Cowen, 78. It might as well be said that the defendant would have been liable if the plaintiff had found the door unlocked and had gone in, and in the darkness had fallen down some well or hurt herself by stumbling over some piece of machinery. The finding that she was not guilty of negligence in not discovering and avoiding the open area, is not intended to mean that she did not know it was dark and that she did not know that she was ignorant of the premises.

3. Upon the adjudged cases the law is with the defendant. *City of Norwich v. Breed*, 30 Conn., 535, 548; *Beardsley v. City of Hartford*, 50 id., 529; *Gardner v. N. Haven & Northampton Co.*, 51 id., 143; *Howland v. Vincent*, 10 Met., 371; *Phila. & Reading R. R. Co. v. Hummell*, 44 Penn. St., 375, 379; *Gilles v. Penn. R. R. Co.*, 59 id., 143; *Gramlich v. Wurst*, 86 id., 74; *Witham v. City of Portland*, 72 Maine, 539; *Baker v. Byrne*, 58 Barb., 438; *Roulston v. Clark*, 3

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E. D. Smith, 366; *Severy v. Nickerson*, 120 Mass., 306; *Pierce v. Whitecomb*, 48 Verm., 127; *Kahl v. Love*, 37 N. Jer. Law, 5; *Southcote v. Stanley*, 1 Hurlst. & N., 247; *Hardcastle v. South Yorkshire Railway Co.*, 4 id., 67; *Hounsell v. Smyth*, 7 Com. Bench, N. S., 731; *Seymour v. Maddox*, 16 Queen's Bench, 326.

4. It is a question of fact, in a given case, whether the defendant owed the plaintiff a duty in making his premises safe for him to come upon them. *Hydraulic Works Co. v. Orr*, 83 Penn. St., 332; *Railroad Co. v. Stout*, 17 Wall., 657; *Stratton v. Staples*, 59 Maine, 94; *Low v. Grand Trunk Railway Co.*, 72 id., 313; *Larue v. Farren Hotel Co.*, 116 Mass., 67. This fact is not found here. No duty is imposed by law to keep one's premises in a safe condition for those who come there solely for their own convenience or pleasure. *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 373.

STODDARD, J. A demurrer to the complaint was filed in this case; that demurrer was overruled, and in accordance with our practice the damages were assessed by the court.

In this jurisdiction the effect of a demurrer to the complaint in cases of this character is to admit, for the purposes of the hearing in damages, the truth of every material and well-pleaded statement of fact in the complaint. Such admission is conclusive so far as the right of action, and the consequent right to nominal damages is concerned, and is *prima facie* as related to substantial damages. The defendant has the legal right to prove the non-existence of the alleged fact as bearing upon substantial damages. The burden of proof in this particular is upon the defendant, and if he fails to prove the non-existence of the alleged fact, such fact is regarded as established in all its effects upon, and relation to, actual damages.

The recent case of *Crane v. Eastern Transportation Line*, 48 Conn., 363, and again before this court in 50 Conn., 342, seems to settle the practice in this state.

In the first paragraph of the complaint it is alleged that the defendant kept, maintained, and permitted to remain on

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his premises, substantially adjoining the public highway, and so near the public footway of said highway as to make the use of the same unsafe and dangerous, a deep area or pit, without rail, cover or guard of any kind.

It was not pretended in the argument that the area was not dangerous in itself, and its dangerous character is apparent from the finding. But it is said that the defendant owed no duty to this plaintiff not to maintain this dangerous pit. It is upon this theory alone that the judgment of the court below was pronounced, and by this theory that judgment must be tested, and the case be disposed of here.

There is no finding of fact in this case to disprove the allegation of the complaint that this dangerous area or pit was "so near the public footway of said highway as to make the use of the same unsafe and dangerous." The case does state certain facts from which argumentatively or inferentially the court might be led to find either that the pit was or was not so located in reference to the public way and travel thereon as to make the use of the highway unsafe or dangerous. But the court below made no finding of fact upon this point, thus leaving the legal inference arising from the demurrer to have its full effect upon this allegation in establishing its undeniable truth. This is necessarily so unless it can be said that the court, as matter of law, notwithstanding the admission involved in the demurrer, ought to say that the pit was not so located as to make the use of the highway dangerous. This position has not been taken, and we do not think it can be maintained. That question is peculiarly one of fact, dependent upon all the surrounding and characterising facts, and upon the whole evidence in the cause. The location of the excavation, its proximity to the public way, the character of the use of that public way in numbers, and the manner of its use, the probabilities that travelers would or would not be endangered there, and the like general considerations, are to be weighed by the trial court in every case, and in addition to these general considerations attaching to all cases, the particular and peculiar surroundings of each special case render the question peculiarly one

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of fact and not of law, as a general rule. We think it is plain in this case that the question here involved is a question of fact, and so beyond our jurisdiction to determine. While, therefore, no discussion of the fact will be made, it is perhaps proper to say that to a majority of the court it appears that the evidential facts found and stated by the trial court establish the fact as alleged in the complaint in this particular.

Under such circumstances no authority can be found warranting the treatment of such a question as a question of law to effect a result adverse to this conclusion.

This condition of facts, we feel impelled to say, created and imposed a duty upon the defendant to persons lawfully using the highway.

There is some diversity of opinion as to the test of duty and consequent liability in cases of this kind. It is said that in England and Massachusetts the test of liability is whether the excavation be substantially adjoining the public way, so that a traveler by a false step or misstep might be endangered; and the cases of *Howland v. Vincent*, 10 Met., 371, *Hardcastle v. South Yorkshire Railway Co.*, 4 Hurl. & Nor., 67, and *Hounsell v. Smyth*, 7 Com. B., N. S., 729, are cited to this point.

Without stopping to inquire whether this is a correct statement of the rule in England, a different and much more satisfactory test and rule prevails in this state.

The Massachusetts case cited above certainly adopts that theory; but we do not think it is authoritative. The case is discredited as authority by our own court in *City of Norwich v. Breed*, 30 Conn., 547. Our court plainly implies that the ruling was wrong. It is denied in express terms in *Beck v. Carter*, 6 Hun, 604; and see the same case in the Court of Appeals, 68 N. York, 284. It is adversely criticised in Bigelow's Cases on Torts, 686, 689, and is pronounced in Shearman & Redfield on Negligence, 505, "a decision which it is difficult to justify." A late Massachusetts case seems to ignore the rule as applied in *Howland v. Vincent*, and approximates the test to that of our court in *City of Norwich v.*

Breed. Mistler v. O'Grady, 132 Mass., 139. This last case substitutes for the test stated in *Houland v. Vincent* this language, that the defendant "had no reason to suppose" that any person would attempt to go where the danger was, and that the plaintiff was not "misled by any act or word of the defendant;" a statement of the rule which plainly imposes a duty on this defendant.

The rule laid down in *City of Norwich v. Breed* was stated after an examination of the Massachusetts case and English cases cited above, was declared upon full consideration, and places the liability upon true grounds, and has been cited in other jurisdictions with approval. An extract or two from that case will suffice. "We think that in making the defendant's liability to depend upon the dangerous condition in which the excavation was left by the defendant rather than upon its distance from the street, the judge adopted the true criterion. It is the dangerous character rather than the exact location of the excavation that determines the duty and consequent liability of the defendant in this respect. * * * Whether the excavation could, with a due regard to the rights of passengers on the street, be left unguarded, or could not, depended upon the question whether, being unguarded, it endangered the travel or not; if it did not, no matter how near it was to the line of way; if it did, no matter how far it was removed."

It is plain that there was a duty upon the defendant in reference to the public use of that public way. The next inquiry is, whether that duty attached to the defendant in reference to this plaintiff. The defendant claimed and the court ruled that the plaintiff was a trespasser upon the defendant's property, and was not in the exercise of any rights as a traveler upon the highway.

The material facts bearing upon this part of the case are, that a building used by the defendant as a corset manufactory stood on his premises, extending along the entire street line of eighty-eight feet, and set back ten feet from the line of the public way. The entrance to this building was in front, and consisted of an inclosed wooden porch

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with a door in the front. The door of the porch was five feet and from six to nine inches from the street line. The area was located alongside the building, and adjoins the porch, and is ten feet and nine inches long, two feet and nine inches wide, and five feet and four inches deep. A brick paved public sidewalk was laid along the front of the factory, and three or four years ago the open space between the sidewalk and the building was paved with brick on the same grade as that of the brick sidewalk, thus forming an unbroken and continuous brick sidewalk covering the entire space between the roadway of the street and the defendant's building. There was nothing to mark the exact line of separation between the sidewalk and the defendant's lot. Thus the defendant was maintaining an extension and continuance of the public sidewalk along the entire front of his building up to the line of his building, in the midst of a large city, where the familiar condition of affairs is that the public pavements extend to the line of building. This extension of the public sidewalk was of the same material and constructed in the same manner as the public sidewalk. It was on the same grade, nothing to indicate the place where the public walk ended, and apparently to the eye causing the public walk to extend to the factory.

On the night in question the plaintiff was told that her child was in the defendant's factory. She lived in Collis street, and only a few feet from Franklin. Collis street is a street leading into Franklin street, nearly opposite the south end of the factory. On the evening of the 17th of November, about eight o'clock, going for her child "she went along the Collis street sidewalk to the corner of Franklin street, and then she took a direct line towards and to the wooden porch of the factory, crossing Franklin street diagonally. In trying to find the door she fell into the area. She was unfamiliar with the premises, and did not know of the existence of the area, and is found not to have been negligent in fact in not avoiding the area. The front fence lines of the property owners at either end of

the defendant's shop indicated, in a general way, the line of the public way.

And now it is said that the plaintiff was a trespasser in thus going upon this part of the brick pavement placed upon the defendant's property. We think the defendant's point is not well taken. The entire space up to the factory was apparently a public sidewalk; it does not appear that she knew anything to the contrary. She had a right to use the whole of the apparent public way to reach the defendant's shop. Her errand there was lawful. She had a right to go there, and it will not answer for the defendant to say to the plaintiff, "True it is that by my act there was an apparent, visible, manifest public walk which extended to my shop, but you, a stranger, must be held to know where the divisional line is, although I have so built and maintained the sidewalk that you are naturally misled thereby."

There is no principle of law or justice which will warrant a court in holding a person to be a trespasser who uses as a public way an apparent public sidewalk kept so by the act of the defendant, simply because he steps over the technical legal boundary line. By the construction of the walk the plaintiff, as one of the public, was told in a most emphatic way that the sidewalk extended to its full apparent width. The occasion was in the night season; the plaintiff was not familiar with the premises; it is not found that she knew or could have seen the fence lines at either end of the defendant's property. The defendant's acts would indicate, even if a person knew where the technical line of the street was, that the defendant had thrown open to the public and made part of the public domain that part of his property covered by this extended sidewalk; and much more so as to a person who did not know where the line was.

The streets of our cities, especially in the mercantile and manufacturing districts, are full of instances where the buildings are set on the street line, or at varying distances therefrom, with similar continued and extended pavements. To impose upon persons lawfully using our sidewalks the duty of ascertaining at their peril where the technical

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divisional line lies before venturing to use the sidewalk as it openly and visibly exists, is, in our judgment, not warranted by any authority; and to permit owners and occupiers of such property to construct and maintain unguarded pits and areas in those parts of their premises that are not distinguishable from the public way, will fatally jeopardize public travel.

In *Corby v. Hill*, 4 Com. Bench, N. S., 562, COCKBURN, C. J., said:—"The proprietors of the soil held out an allurements whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. * * * Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe."

In *Beck v. Carter*, 6 Hun, 607, it is said:—"Even if the road had been proved to have been laid out two rods wide, and a few feet belonging to the plaintiff lay between the road and the fence, as it has always been left in common with the road and thereby apparently devoted to the public use, any person would be justified in using it in that way. The fair inference to be drawn from its situation, thus acquiesced in by the owner, is that it has been abandoned to the public. * * * If a house or store is built a few feet from the margin of the street or highway, and no fence is erected along or near the margin, persons are at liberty to assume that the building is on the margin of the street, and that they may lawfully travel over the whole space thus apparently set apart for public use by the owners of the land. * * * To authorize an owner of land adjoining a highway to require travelers lawfully passing along it to keep within the limits of it, as laid out or dedicated, he must indicate in some proper way where the boundaries are, and when that is done he is relieved from liability for

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injuries sustained outside such limits. To hold a traveler, a stranger to the locality, bound to keep within the limits of a lane or alley, in the night as well as in the day, and that the owner of adjoining land may dig pits in his land five or six or seven feet from one of the margins of the street, and if the traveler falls into it and is injured he is without remedy against the owner of the land on which such pit is dug, is so monstrous, so unjust, and so unreasonable, that it needs but to be stated to be repudiated."

But the case at bar is far stronger than the New York case, touching which this language is held. Here the owner and occupier of property had so constructed and built the extension of the sidewalk as to induce and allure people to use it as, and to suppose it to be, a part of the public way. As to persons lawfully using it he thus constituted it an inseparable part and parcel of the public way. Persons using it within the scope of the purpose so plainly indicated by the owner are not trespassers, and are protected by the law from dangerous excavations, pits and traps.

In the Court of Appeals *Beck v. Carter* is thus treated:—"It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had, by use long continued, been made, for the time being, a public place and part of the highway. * * * The boundary of the alley was not defined, and persons crossing the lot in the usual way were not trespassers." 68 N. York, 293.

The case in hand presents not only the public use spoken of by the Court of Appeals, but superadded to that, as a characteristic thing, the personal acts of the defendant in so constructing and using his property as to make it a part of the highway. "There may possibly be," says the court, in *Binks v. South Yorkshire Railway Co.*, 3 Best & Smith, 253, "cases where the owner of land adjoining a way may by his acts induce the public to go near to an excavation in his land so as to get into danger; in which case it would be the same thing whether the way were a highway or not."

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It is stated as a fact in the first count of the complaint that the plaintiff was passing along said public foot-way of said highway, &c., and fell in, &c. The demurrer, as before suggested, in the first instance admits this, and this fact stands, except as modified by the other facts found.

The bare fact that she passed without knowledge on her part, (for this want of knowledge, if material, is admitted because not disproven,) beyond the technical line of the street, is by no means the determining fact in relation to the question whether she was in the exercise of a traveler's right. A traveler's right is not confined to simply passing along the street. He may use the public way for any of the whole range of ordinary acts incident to ordinary travel, not the least of which is the right of approach and entry to an adjoining building for a lawful purpose. And for all these purposes the highway is to be regarded as it apparently exists, as against the defendant who has actually enlarged the width of the highway.

So far this case has been treated upon the theory and facts set forth in the first count of the plaintiff's complaint. That count confessedly proceeds upon the assumption that the plaintiff was in the exercise of a traveler's rights upon a public highway. The plaintiff, fearing that she might be met with the objection that the plaintiff had passed beyond the theoretical line of demarcation, and therefore was not technically a traveler, by amendment inserted a second count, in which the physical facts surrounding the area are stated precisely as they are proved and hereinbefore recited; and in addition thereto particularly alleged that the plaintiff "was passing along said public way, and from the said public way passed over and upon the said brick pavement of the defendant."

It is now claimed that the second count is identical with the first, notwithstanding the first count alleges that she was a traveler, and the second count states every fact which is relied upon by the defendant to establish his vital proposition that she was not a traveler. The second count also is framed in strict accord with the letter and spirit of the

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Practice Act. It "contains a statement of the facts constituting the cause of action;" and if those statements are substantially established the right of recovery follows; and this is the result without reference to the plaintiff's *status* as a traveler; for the substance of that count is that she, the plaintiff, was induced by the acts of the defendant to pass from the public way to and upon the defendant's premises.

We understand the law to be so that, if a person is induced or allured upon another's premises, the owner or occupier of such premises owes a duty to such person to see that his premises are in a reasonably safe condition, and that this duty attaches to the defendant in reference to the personality of the allured individual. Upon these facts the right of action is complete even if the plaintiff was not a traveler. It is therefore immaterial to inquire whether the plaintiff called herself a traveler. Even if she had said in the complaint in express terms that she considered herself a traveler and entitled to protection in that character, but the court should be of opinion that she was not at the time of the injury technically a traveler, but that she was upon the facts alleged and proved entitled to protection as an individual, there can be on that ground no objection to a recovery. The plaintiff was not bound to state in the complaint the legal theory of her case; nor is the legal theory in any case material, except, possibly, where the form of action is material to the rights of the parties.

The Court of Appeals in *Hemmingway v. Boucher*, 98 N. York, 287, states the rule in this language:—"The party was under no obligation to state in his pleading the theory of the law upon which his claim is based."

And we also think that this second count is properly framed to obviate the objection that the plaintiff was not a traveler. The first count alleges that she was a traveler, and we think the second count is not a meaningless repetition of the first count. That it accomplishes its evident design is clear, and forces us to examine the case as presenting the question (assuming the plaintiff not to have

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been a traveler,) whether the plaintiff was or was not induced or allured to enter upon the defendant's property. In this view of the case, as we have already stated, the character of a traveler is not essential to the plaintiff's right of recovery.

If the plaintiff was induced by the defendant to come, or allured, upon the defendant's land, it is not necessary for the plaintiff to claim that a highway existed, either actual or imputed, as against this defendant. But if the defendant had dedicated to the public a right of passage, or had so constructed his sidewalk as to induce people to believe that the public right of way existed, and therefore as to a person so supposing and acting thereon that public right should be held to exist, this condition would have a very material bearing upon the question of allurement or inducement. For if there was an apparent public way a person, though not strictly a traveler, has a right to proceed upon the assumption that guards against dangers are provided co-extensive with the apparent purpose and use of the way.

Reverting now to our original proposition, that the effect of the demurrer to this complaint is to admit the truth of every material well-pleaded fact as stated, except so far as such statement of fact may be modified or controlled by the facts found upon the hearing, we find, by reference to the second paragraph of the second count, a statement of fact that the defendant "kept and maintained on his own land, between the public footway or pavement on said Franklin street and said pit or area, a brick pavement or footway, in all respects like the public pavement or footway, separated in no manner therefrom, and invited, licensed and permitted the public to make use of the same in the same manner and to the same extent that they made use of the public way, from which it was in no manner to be distinguished by the eye."

This statement of fact certainly is not denied by any direct statement in the finding, but, on the other hand, it is in substance and effect confirmed and established by the

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finding; for it is found that the public sidewalk had been widened and continued up to the defendant's building, and so kept and maintained by him, and that there was nothing to mark the exact line of separation. That the sidewalk on the defendant's premises was paved with brick in the same manner as the public footway, and was on the same grade, is also found. Thus the finding in substance accords with the allegation in this particular.

But it is said that the front fence lines of the adjoining owners would indicate to the ordinary traveler the general line and course of the sidewalk. Assuming this, and assuming also that such indications would exist in the night season when the front fence lines might not be seen, or, if seen, would probably not be effective, yet that fact does not help the defendant as to the controlling fact that he had so built, kept and maintained his sidewalk as to induce people to go beyond the line of the adjoining front fences. Besides, the accident happened in the night season, and there is no fact in the case to lead to the belief that the plaintiff was cognizant of the line of those front fences or knew of their existence even.

In the leading case of *Sweeney v. Old Colony R. R. Co.*, 10 Allen, 373, BIGELOW, C. J., giving the opinion says:—"The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurements or inducements, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by

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visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this:—A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter or pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.”

The plaintiff alleges that it was by reason of the existence of the pavement on the defendant's land, constructed as it was, that she passed beyond the limits of the highway. Instead of contradicting this allegation the facts found support and confirm it. How could it be more certainly indicated that this part of the defendant's land was “intended to be used by visitors or passengers,” and that it was “adapted and prepared for such use,” than by extending and continuing a public sidewalk over it? He built and maintained this walk so that every person whose interest or inclination led him so to do, would naturally enter upon it supposing it was intended for public use, and therefore properly guarded. See *Mellen v. Morrill*, 126 Mass., 546, and *Mistler v. O'Grady*, 132 id. 139, 141.

“The question is, did a reasonable regard for the safety of those whom the use to which the defendants had devoted their wharf might be expected to bring there, require something in the way of safeguards at this gangway?” *Low v. Grand Trunk Railway Co.*, 72 Maine, 319.

In *Hydraulic Works Co. v. Orr*, 83 Penn. St., 335, that court, by AGNEW, C. J., upheld a verdict for damages at the suit of a trespasser, upon the theory that the occupier of premises “has reason to apprehend danger owing to the peculiar situation of his property and its openness to accident,” and “that this spot was not so private and secluded as that a man might keep dangerous pits or deadfalls there without a breach of duty to society.”

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The turn-table case of *Railroad Co. v Stout*, 17 Wall., 657, and that of *Birge v. Gardiner*, 19 Conn., 507, proceed upon the same general theory. See also *Haughey v. Hart*, 62 Iowa, 98; *Young v. Harvey*, 16 Ind., 314.

Shearman & Redfield on Negligence, page 599, say:—
“Of course it is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land and using that right with ordinary care.” Tested by this statement of the law the plaintiff's right must be conceded. Under any view of this case she was lawfully on the land, and in the exercise of ordinary care.

So in Addison on Torts it is said, page 163, 3d ed.:—
“But if a person, being upon the premises of another on lawful business, without any fault or negligence of his own, falls through a hole on such premises, the occupier will be responsible.” Again, on page 164:—“Every occupier of a house who makes or permits the continuance or use of a pathway to the house may fairly be deemed to hold out an invitation to all persons, who have any reasonable ground for coming to the house, to pass along his pathway.” Wharton on Negligence, § 824a, lays down this proposition:—“At the same time it must be kept in mind that he is bound to keep his premises in such order that visitors whom he invites, when acting prudently, will not be injured; and if dangerous places exist by which they, exercising such prudence, might be hurt, his duty is to give notice of the danger. * * * And if he is aware that persons are in the habit of passing over his grounds, trespassers though they may be, he is liable if he leaves in their way dangerous excavations or instruments by which they are injured. By making the path as an approach to his house he has thereby given implied permission to all persons having occasion to do so to go over it to his house, and he cannot shield himself from liability upon the ground that they had no business there. He is treated, by maintaining the path, as holding out an invitation to all persons to use it who have reasonable grounds to do so, and he is bound at his peril to

keep it in safe condition." To the same effect is Wood on Nuisances, § 187. In *Vanderbeck v. Hendry*, 34 N. Jer. Law R., 471, it is said:—"It has been substantially held that although a way may not have been dedicated to the public, or otherwise legally established for the use of the public, yet if the owner of premises over which it passes has exhibited an intention that it shall be used by the public, either as a means of access to his property or over it, and by the manifestation of that intention has induced or allured the public to use it, those using it within the scope of the purpose manifested are entitled to be protected from dangers to the way by reason of obstructions or interferences created during its existence, and resulting from the want of ordinary care on the part of the owner or those acting within his authority."

Authorities to the same point, in great numbers, firmly establish a principle of law that imposes a duty upon an occupier of land. The extent of that duty is co-extensive with the use to which he subjects his premises.

Under some circumstances trespassers are protected; in others, trespassers are at their own risk, while visitors are entitled to a reasonably safe passage; and in others still the public have rights that the occupier cannot safely ignore.

Trespasser the plaintiff was not; and whether she be regarded as a visitor by invitation going upon private property, or one of the public in the enjoyment of a public right by using an apparent public way as a means of access to the defendant's building, and being injured by "a concealed source of mischief," she was entitled to recover substantial damages.

There is error in the judgment of the Superior Court.

In this opinion GRANGER, J., concurred.

PARK, C. J. I concur in the foregoing opinion in all respects except in the view there presented of the effect of a demurrer overruled on the hearing in damages. I think the judge who wrote it has somewhat misapprehended the

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effect and extent of our decision in *Crane v. The Eastern Transportation Line*, 48 Conn., 361. I will briefly state my views upon the point.

A demurrer admits the truth of the alleged facts for the sole purpose of testing their legal sufficiency. If the demurrer is overruled, and the defendant answers over, the admission cannot be used as evidence against him. It stands like any other case where the allegations of fact are denied—the facts are determined by the proof, and not by the pleadings.

The principle is the same when the defendant, instead of answering over, submits to the adverse judgment on the demurrer. This case is for unliquidated damages. In the absence of any proof the plaintiff recovers nominal damages only. The burden is on him to show the extent of the injury. The allegations of injury and damage, although admitted by the pleadings, are not substantive evidence in his favor. The extent of the injury is to be proved like similar facts in any other case. When he has done that, no evidence being offered of due care by the defendant, or contributory negligence on the part of the plaintiff, the plaintiff will recover all the damages proved. That is on the ground that the demurrer, on which the judgment rests, admits the defendant's negligence and due care on the part of the plaintiff. But notwithstanding the demurrer we have repeatedly held, and that is now the settled doctrine in this state, that it is competent for the defendant to controvert the facts as to negligence, not to affect the question of liability, but solely to affect the amount of damages. But such evidence is independent and outside of the pleadings. In this respect the burden is on the defendant; and that is the extent of the decision in *Crane v. The Eastern Transportation Line*, as I understand it. If he offers no evidence judgment goes against him for all the damages proved. But if he offers evidence on the subject of negligence, the question must be determined wholly by the evidence. As the defendant takes the burden he must establish his claims by a preponderance of proof. The ad-

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mission by the demurrer is not to be used as evidence against him. The effect of that is exhausted in conclusively establishing his liability for some damages and casting upon him the burden of proof. The admission cannot be thrown into the scale in weighing the evidence.

With this qualification I fully concur with Judge GRANGER in the opinion of Judge STODDARD.

CARPENTER, J. (Dissenting). The plaintiff's case proceeds upon the theory that the pit or area on the defendant's premises made the use of the sidewalk by the public dangerous, and that the plaintiff, Mrs. Crogan, while using the sidewalk, fell into the pit and was injured. Both counts in the complaint are adapted to that theory, and the case in the court below was tried and decided on that ground.

The defendant's claim, which was sustained by the court, was,—1st, that the plaintiff was not injured while in the exercise of any rights as a traveller upon a highway, but was upon the defendant's premises, seeking to find the door to his factory, and consequently that there was a substantial variance; 2d, that the plaintiff was a trespasser; and 3d, that upon the facts the plaintiff was entitled to only nominal damages.

The errors assigned by the plaintiff follow exactly the claims made by the defendant. We see no suggestion in the record that any claim was made by the plaintiff that the defendant was liable on any other ground than that he had exposed to harm those using the highway.

If then the plaintiff, *as a traveller on the highway*, received no injury, the cause of action as alleged in the complaint is not proved, and she can recover only nominal damages. Upon principle this must be so. The defendant's liability to a traveller depends upon the proximity of the pit to the sidewalk and its connection therewith; his liability to one properly on his land depends upon the location of the pit in connection with the special circumstances of the case; was the pit such that strangers would be likely to fall into it?

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had the defendant reason to anticipate such consequences, and was it his duty to guard against them?

It is obvious that the duty which the defendant owed to the travelling public is very different from that which he owed to individuals coming upon his premises. The degree of care is greater in the one case than in the other, and depends upon an entirely different state of facts. In the one case it is a material inquiry, was the plaintiff in contemplation of law a traveller upon the highway when injured? In the other such an inquiry would be irrelevant.

In the first count in the complaint it is alleged that the defendant kept and maintained, substantially adjoining Franklin street, a public highway, and so near the public footway of the highway as to make the use of the same unsafe and dangerous, a deep area or pit, without rail, cover or guard of any kind; and that the plaintiff was injured when "passing along said public footway of said highway."

In the second count it is alleged that the defendant "kept and maintained upon his said land between the public footway or pavement on said Franklin street and said pit or area, a brick pavement or footway in all respects like the public pavement or footway, and separated in no manner therefrom, and invited, licensed and permitted the public to make use of the same in the same manner and to the same extent that they made use of the public way from which it was in no manner to be distinguished by the eye." It is then alleged that "the said plaintiff, Sarah M. Crogan, was passing along said *public way*, and from the said *public way* passed over and upon the said brick pavement of the defendant, *and by reason of the existence of the same* and of said area or pit, and the want of any rail, cover or guard, and of any light or warning, she being in the exercise of due care, slipped and fell into said area or pit."

Now the case shows that the plaintiff went "to the corner of Franklin street, and then she took a direct line towards and to the wooden porch of the factory, crossing Franklin street diagonally. When she reached the porch she missed the door knob, and in stepping around to find it she fell into the area, &c."

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Thus it will be seen that all she had to do with the sidewalk was to cross it diagonally. She did not unintentionally stray from the sidewalk, but she consciously and intentionally left it to go to the defendant's building. The defendant's brick pavement had nothing whatever to do with causing the accident. It seems to me very clear that the facts proved disprove the cause of action alleged.

Whether the defendant owed the plaintiff any duty which he neglected, considering her merely as an individual on his premises, and not one of the public on the sidewalk, is a question which was not tried in the court below, and one which cannot now be tried in this court. The defendant's counsel deny any such liability under this complaint, and the plaintiff's counsel practically admit that there is none; for the only claim which they make under the second count is that she was not a trespasser in passing over the defendant's brick pavement, but that she was induced or allured to enter upon the defendant's property from the sidewalk by means of said pavement. I do not controvert the proposition that she was lawfully on the defendant's land; but it is difficult to see how she was allured thereon by the defendant's pavement. Her sole object in going to the building was to look after her boy, who, as she supposed, was in danger, and she went directly there without any regard to the pavement. And that is all the allurement there was; an implied license to go upon the premises. Upon these facts to say that that pavement "allured" the plaintiff on to the premises and into the pit, seems to me a gratuitous assumption, not warranted by anything in the finding. I think the decision of the Superior Court was right.

I concur fully in the views presented by the Chief Justice in his opinion, with regard to the effect of a demurrer overruled on the position of the parties upon the hearing in damages.

In this opinion LOOMIS, J., concurred.

GEORGE BROWN vs. THE TOWN OF SOUTHBURY.

The act of 1883 (Sessions Laws 1883, p. 283) provides that the notice to be given to the selectmen of a town by any person injured by means of a defect in a highway, shall state the nature of the injury. A notice of an injury to a horse, carriage and harness, stated it as follows: "Said horse was injured in the left leg and knee joint and otherwise bruised and injured; said carriage was injured by breaking the right shaft and being wrenched and sprung; and said harness was much broken." Held to be sufficient.

The act requires the place of the injury to be stated in the notice. The place was described as "a defective sluice across the highway between the dwelling house of *E. B.* and the *J. H.* place, so called." There were between those points three sluice ways, within twenty-five rods, of which the middle one only was defective. Held that the notice was sufficient.

The plaintiff alleged the notice in his complaint, and the defendant demurred and the case was heard in damages. Held not necessary for the plaintiff to prove the notice. Whether the defendant could have shown the want of notice in fact for the purpose of affecting the question of damages: *Quære*.

The loss of the use of the horse was a direct consequence of the injury and a proper element of damage.

Where in assessing the damages the court below found the actual damage to be \$161, and included in the judgment \$10.59 as interest on that sum to the date of the judgment, it was held that whether the interest was properly included or not, the sum was too small to justify the granting of a new trial for the error.

[Argued June 14th—decided June 26th, 1885.]

ACTION to recover for an injury from a defect in a highway of the defendant town; brought to the Court of Common Pleas, and heard in damages, upon a demurrer overruled, before *Torrance, J.* Facts found and damages assessed at \$171.59. Appeal to this court by the defendants. The case is fully stated in the opinion.

A. N. Wheeler, for the appellants.

W. L. Bennett, for the appellee.

CARPENTER, J. This is an action for injury to property by reason of a defective highway, and was heard in damages after demurrer overruled.

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The defendant objected to the admission in evidence of the notice to the selectmen required by statute (Session Laws of 1883, p. 283) on the ground that it did not sufficiently describe the nature of the injury and the place of its occurrence. The court overruled the objection.

Under the statute as it originally passed in 1874, the nature of the injury did not need to be stated in the notice, but it is required by the act as amended in 1883. We think the nature of the injury is sufficiently described. The injury was to a horse, wagon and harness, and is thus described:—"That said horse was injured in the left leg and knee joint and otherwise bruised and injured; that said carriage was injured by breaking the right shaft and being wrenched and sprung; and that said harness was much broken and injured."

This notice is required of plain men, and, in a majority of instances, of men of common or limited education, and must be given within sixty days after the injury. It is absurd to suppose that the legislature intended that it should be given in technical terms, or that the injury should be accurately described in detail. A general description, which will reasonably apprise the selectmen of the general character of the injury, is all that is required. That was given in this case.

The place of its occurrence is thus described:—"Through a defective sluice across the highway in said town, at a point between the dwelling house of Elliott B. Bradley and the John Honahan place, so called." Between these points there are three sluice ways, and within twenty-five rods. Only one was defective, and that was the middle one. The defect, as found by the court, was "a hole in the traveled track, about three feet deep and six inches wide and extending across the sluice way very nearly the width of a carriage." The defect was an obvious one. We think it is very clear that the selectmen had such notice of the place as that they could not have been misled, and could not have mistaken its identity. We think the evidence was properly admitted.

Obviously the plaintiff had no occasion to prove the notice,

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for it was alleged in the complaint and admitted by the demurrer. Whether the defendant could have shown want of notice for the purpose of affecting the question of damages, is a question we need not consider.

The claim that the loss of the use of the horse is too remote, and that damages therefor cannot be recovered in this action, cannot be sustained. The loss was the direct and natural consequence of the injury. That it was a proper element of damage is too clear for argument.

The court below estimated the actual damage sustained by the plaintiff at \$161, and included in the judgment the further sum of \$10.59, as interest on that sum to the date of the judgment. The defendant assigns this as an error. It is not usual in this class of cases to allow interest as such, or to allow it as damages for the detention of money due. It may be proper in some cases to take into consideration the lapse of time in assessing damages. Whether this is such a case is unimportant, because the amount thus allowed, \$10.59, is too insignificant to justify us in reversing the judgment and granting a new trial.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

THOMAS C. PERKINS AND ANOTHER *vs.* THE CITY OF NEW
HAVEN.

The police commissioners of the city of New Haven are agents of the state, engaged in performing public and governmental duties, and are not agents of the city or engaged in any matter of municipal concern.

The law having imposed upon these commissioners the duty of providing voting places in the city and town for all national and state elections, they can not, by hiring rooms for the purpose, bring the city under an obligation to pay the rent for them.

[Argued June 4th—decided June 26th, 1885.]

ACTION of *scire facias* upon a process of foreign attachment, to recover of the defendant city as a garnishee certain

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money claimed to be due to one Chesley; brought, by appeal from a justice of the peace, to the Court of Common Pleas, and by that court reserved for advice. The case is sufficiently stated in the opinion.

S. C. Loomis, for the plaintiffs.

C. T. Driscoll and *E. B. Graves*, for the defendant.

STODDARD, J. The plaintiffs' contention in this case is grounded upon the theory that the police commissioners of the city of New Haven are the agents of the city, and have therefore the power to contract so as to bind the city. PARK, J., giving expression to the law while construing the charter of the city of New Haven, said in *Jewett v. City of New Haven*, 38 Conn., 379:—"Now it is conceded that the boards of police and road commissioners have governmental duties imposed upon them by two of these enactments;" and in accordance with this statement of the law it has been universally agreed that the police commissioners of the city of New Haven are state or public agents engaged in performing public and governmental duties, and that they are not private agents or servants of the city, nor engaged in any matter of corporate and proprietary concern. Under this state of the law the legislative power saw fit to impose upon these public agents a single other public duty, that of selecting and providing voting places in the city and town of New Haven for all elections except school elections.

In performance of their duty in this respect the police commissioners hired a room to be used as a voting place at a meeting of electors to pass upon the adoption of a constitutional amendment, and also for the last state and national elections. No city election was held at either of said times.

There is no other statute imposing the expense of providing voting places upon the city treasury.

It is the established custom in our legislation to impose upon the several town treasuries the various local expenses necessarily connected with state and national elections.

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There is nothing in the charter of the city of New Haven indicating legislative intent to charge the city treasury with these expenses in the town of New Haven. Such an act of legislation would be anomalous, and wholly at variance with the general and ancient practice in this state.

It is difficult to conceive a duty more plainly and exclusively public and governmental than that of regulating state and national elections, and the police commissioners in the discharge of their duty in providing voting places for such elections are public agents, and not the agents of the city, and therefore can create no contract relation between the city and third persons in this respect.

The Court of Common Pleas is advised to render judgment for the defendant.

In this opinion the other judges concurred.

JAMES H. WEBB, ADMINISTRATOR, *vs.* JEREMIAH GOOD-
NOUGH AND OTHERS.

A testatrix by one clause of her will gave all her property without qualification to *A. G. S.*, the will concluding as follows:—"I appoint my husband, *J. G.*, executor of this will, who is to have his support out of the property, and may dispose of any or all of it if necessary for his support. All that remains at his death is to be given, as written above, to *A. G. S.*—she to have the control and use during her life." Held—

1. That the interest of *A. G. S.* was only a life estate, to commence at *J. G.*'s death.
2. That *J. G.* was entitled to the possession and control of the property during his life.
3. That his right to use the property for his support included also the right to support from it a wife whom he afterwards married.

The will gave the property at the decease of *A. G. S.* to her son *J. S.*, he to have possession when of age, and if other children were born to her, they to share equally when of age. *J. S.* died, but a later-born brother *R. S.* survived him. Held that the remainder vested in *R. S.*, subject to open and let in after-born children.

[Argued June 5th—decided August 22d, 1885.]

Webb v. Goodnough.

SUIT for advice as to the construction of the will of Adeline A. Goodnough, brought by the plaintiff, as administrator of her estate with the will annexed, to the Superior Court. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

J. H. Webster, for the plaintiff.

J. W. Alling, for J. Goodnough.

W. L. Bennett and *A. N. Wheeler*, for S. T. Stewart, A. G. Stewart and R. G. Stewart.

CARPENTER, J. The testatrix gave all her property to Addie G. Stewart. The will concluded as follows:—"I nominate, constitute and appoint my husband, Jeremiah Goodnough, the executor of this my last will and testament, who is to have his support out of the property, and may dispose of any or all of the above property if necessary for his support. All that remains at his death is to be given, as written above, to Addie G. Stewart, she to have the entire control and use during her lifetime; at her decease it shall be given to Jesse W. Stewart, he to have possession when twenty-one years of age, and if other children are born to her they shall share equally when twenty-one years old. If she leave no issue it shall be given to Sarah J. Brown of Wilkinsonville, Mass."

The first and third questions will be considered together. They are, in substance, what interests do Mrs. Stewart and Mr. Goodnough take respectively?

The will is crude, and carelessly drawn, but in the light of the facts as they then existed, it is not very difficult to ascertain the intention of the testatrix. Mr. and Mrs. Goodnough lived together fifty-two years, they had no children, and Mrs. Stewart was brought up and educated by them. The property in question was given to Mrs. Goodnough by her husband during their married life without other consideration than love and affection. The will

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was made in 1882, and Mr. Goodnough was then about seventy-six years old. A part of the property is the house in which the parties lived. It will not be presumed, but must be shown if the fact was so, that she intended that her husband upon her death should be rudely severed from all his home associations and driven to find shelter and a home elsewhere. There are certainly no surrounding circumstances rendering such an intention probable. If we turn our attention to the will itself we not only fail to find it there, but we do find indications of a contrary intention. He was named executor, and as such was to have such possession of the property, as that office entitled him to. He was to have his support out of the property during life, and there is no intervening trustee to possess and control it. In connection with his support he was authorized to dispose of any and all the property, if necessary, for that purpose. From these provisions there is an implication, more or less strong, that he was to have the possession of the property during life.

The only other person that can lay any claim to it is Mrs. Stewart. Her interest is more clearly defined. The first clause of the will, if taken by itself, would give her the property absolutely from the death of the testatrix. But, taken in connection with what follows, her interest is not only reduced to a life estate, but that estate is made to commence at Mr. Goodnough's death. "All that remains at his death is to be given, as written above, to Addie G. Stewart, she to have the entire control and use during her life-time." Then follows a disposition of the remainder to children. The possession and control of the property by Mrs. Stewart during Mr. Goodnough's life, are not consistent with the provisions of the will in his favor.

It is objected that this construction makes the first clause in the will, giving the estate absolutely to Mrs. Stewart, inoperative. But that clause, so far as it purports to give her a fee simple, is clearly made inoperative by the subsequent provisions. As thus qualified it only operates to give her a life-estate. It was competent for the testatrix in

this manner not only to cut down the estate devised, but also to postpone its commencement. We think she has done both.

It is further objected that it would necessitate the raising of an estate in a trustee by implication and vesting the title in him during the life of Mr. Goodnough. If necessary to consider the will as raising a trust, we do not think it is necessary to call in the assistance of a third person as trustee. So long as Mr. Goodnough is capable of properly managing the estate he is in some sense, and may be regarded as, a trustee, to apply the income, and the principal if necessary, to his own support, and the remainder at his decease to be delivered to Mrs. Stewart.

It is also said that this construction leaves a portion of the income undisposed of. But it does not appear that the income will be any more than sufficient for his support. The testatrix clearly contemplated the probability that it would be necessary to sell a portion of the principal for that purpose. The estate is not large and is incumbered. The testatrix does not seem to have had in mind the possibility of a surplus. She knew that she wanted to provide for the support of her husband, and having done so in the simplest possible manner she did not concern herself with details and incidents. In a well considered and carefully written will, especially if the estate is relatively large, an omission of this character might be entitled to much consideration; in a case like this it can have but little weight. Forgetting a matter of this kind cannot seriously affect the disposition of other and more important matters which she evidently had in mind. It is possible, should Mr. Goodnough live many years, that in some years there may be a surplus, while in others there may be a deficiency. We see no difficulty in allowing any surplus to remain in his hands to provide for such deficiencies. At his death any surplus will be included in what "remains" and will go to Mrs. Stewart.

The second question is—what interest does Roy G. Stewart take?

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Jesse W. Stewart was a son of Addie G. Stewart and is now dead. Roy G. Stewart, another son, later-born, is now living. We think it is very clear that the remainder vests in him, subject of course to open and let in after-born children.

The next question is, whether Mr. Goodnough is entitled as a part of his support to the expense of keeping and providing for his present wife in a proper and suitable manner. The facts bearing upon this question are found as follows:—"From a period shortly before the marriage of Mr. Goodnough with his present wife, to the present time, Mr. Goodnough owing to his advanced age and bodily infirmities, has been and now is in need of an attendant to take care of him. He will probably continue to need such an attendant the rest of his life. For about half of said period he has been sick and under the care of a physician. He has for such period needed the services of a nurse. Such services were rendered by his wife."

The provision for his support should be liberally construed. He is not to be required to change essentially his style of living, to board at the lowest possible rate, or to live alone. It seems reasonable that he should be permitted to continue in the house in which he lived so long. If so, it is necessary that some one should care for his house and take care of him in health and sickness. For that purpose it may not be unreasonable that he should have a wife. Possibly it is the most economical arrangement he can make. We do not care therefore to discuss the abstract question whether provision for a man's support includes as matter of law the support of a wife. It seems to us that the real question is, whether it is reasonable under all the circumstances that he should have a wife.

We are disposed to advise the Superior Court that under the circumstances of this case the support of a wife may be properly included in his own support. The expenses of a housekeeper or nurse, or both, may be more than the cost of supporting the wife. Hence it may be better for all concerned.

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We answer the fifth question by saying that Mr. Goodnough is entitled to his support from the death of the testatrix.

As to the expenses of litigation. We do not think that sufficient facts appear to enable us to decide this matter. The facts stated hardly raise any legal questions. We will only say generally, that we are aware of no inflexible rule of law that will prevent their payment. If Mr. Goodnough was without fault, or even if he was legally in fault, the circumstances may be such as to make them a proper claim. He may have been called upon to defend the estate, or to settle some conflicting claims respecting his own rights. In these and like cases a liberal construction of the will would allow to him any legal expenses reasonably incurred.

The questions relating to the sale of stock and real estate are to be determined upon business rather than legal principles. We ought not, in this proceeding certainly, to be called upon to settle them. If a sale of either is to be effected it may be necessary to invoke the aid of the courts. The time to settle any legal questions that may arise, will be when they are presented in a regular proceeding and all the facts are ascertained.

In this opinion the other judges concurred.

SOLOMON COHEN vs. WILLIAM H. PEMBERTON.

The defendant ordered of the plaintiff a quantity of hats and caps of specified sizes, the price being regulated by their price per dozen and each class being ordered as so many parts of a dozen. The goods were sent with a bill which corresponded with the order. The defendant kept them a month before opening the boxes, when he discovered that some of the caps were not of the size required by the order and indicated by the labels on them. Held that he might, within a reasonable time, return such of them as did not answer the order.

And that he was not bound to return the entire quantity of any particular class of the caps, the designation of them in the order as parts of dozens being for convenience and not intended to make the contract as to each class an entirety.

53	231
66	92
53	221
70	719
53	221
74	810

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What is a reasonable time for the return of the goods in such a case is a question of fact, depending on the circumstances.

The bill sent by the plaintiff with the goods had the following printed heading :—"All claims must be made within three days after receipt of the goods." Held, as the case stood, to be no part of the defendant's contract.

Where the questions of fact are fairly submitted to the jury in regard to a matter wholly within their province, the court is not bound to comment on the bearing and weight of the evidence.

[Argued June 9th—decided September 5th, 1885.]

ACTION to recover for a quantity of hats, caps and gloves sold ; brought, by appeal from the judgment of a justice of the peace, to the Court of Common Pleas, and tried to the jury on a general denial, before *Studley, J.*

On the trial it was admitted by both plaintiff and defendant, that the goods specified in the bill of particulars were ordered by the defendant of the plaintiff in September, 1883, to be sent as freight ; the order describing the goods in each case as parts of a dozen, the following extract from it showing its general manner :

" $\frac{1}{2}$ doz. rat high college,	$6\frac{1}{8}$, $7\frac{2}{8}$, $7\frac{2}{8}$, $7\frac{1}{8}$	-----	\$18.50
$\frac{1}{2}$ " " high jockey, sizes as above		-----	18.50
$\frac{1}{2}$ " " boys' Alexis,	$6\frac{1}{4}$, $6\frac{2}{8}$, $7\frac{2}{8}$, $7\frac{1}{8}$	-----	17.50 "

The goods mentioned in the bill of particulars were sent as freight and delivered at the defendant's store October 16th, 1883, packed in one case. A bill of the same was at the same time sent by mail and duly received by the defendant, a part of the printed heading of which was—"All claims must be made within three days after receipt of the goods." The case of goods remained in the defendant's store unopened till November 15th, 1883, when he opened it to sell one of the caps to a customer. The order specified the sizes of a portion of the caps and in the items mentioned the figures at the right of the specifications of styles represent the sizes ordered and the figures over the sizes represent the number of that size ordered, and the figures at the extreme right represent the price in dollars per dozen. The caps corresponded in all respects except size to the order.

The defendant offered evidence to prove, and claimed to have proved, that the caps sent him under this order were labeled with the sizes that he ordered, but were in fact not all of them the sizes that he ordered.

The defendant offered evidence to prove, and claimed that he had proved, that he returned those, the actual sizes of which did not correspond to his order, and that he had paid the plaintiff for those that he retained; and that he owed the plaintiff nothing except \$4.75 for a pair of gloves, for which amount he made an offer of judgment.

The defendant admitted that he received the goods in a box and did not unpack them until November 15th, 1883, when he attempted to sell one of the caps in question; and he offered evidence to show, and claimed to have proved, that at this time he discovered that one of the caps was not properly marked, and that thereupon he measured the caps and returned at once those which did not correspond to the order.

The plaintiff claimed, and it appeared in evidence, that the defendant did not return all of any one of the several kinds or styles ordered at a certain price per dozen by each of the partial orders, but in every case he returned less than all the caps within each of such orders for so many dozen or fractional parts of a dozen. The defendant claimed that in each case the caps returned did not correspond to the sizes ordered.

The defendant further admitted that he had no way of telling which of the caps in the several partial orders were incorrectly sized, or which of them were returned by him, but only their number, nor what the variation from the actual size was. It was further admitted by both parties that the plaintiff refused to receive the goods returned, duly notifying the defendant thereof; also that the defendant paid to the plaintiff a sum equal in value to the goods retained.

The plaintiff offered evidence to prove, and claimed to have proved, that the caps were sent according to the order given, and that the defendant kept them an unreasonable time before examination, and thus waived any right of rescission

that he might have had; and further claimed that by the acceptance of parts of each of the partial orders he became bound to accept all of each of the orders, and that by attempting to sell the goods before examination he waived the right of rescission.

The defendant offered evidence to prove, and claimed to have proved, that it was a very rare occurrence that caps and hats were labeled with marks representing wrong sizes, and that a man of ordinary diligence in the hat trade would not examine hats or caps to see that the marks showing their sizes corresponded to the actual sizes and would not discover the fact until the sale of them or something special called his attention to it; and he claimed to the jury that in the exercise of ordinary diligence he would not have discovered the fact that the caps were marked with the wrong sizes, even if he had opened the box and examined them at once on receiving them.

The defendant requested the court to charge the jury in writing as follows:

“The whole question of acceptance is one of ordinary diligence. The defendant was not bound to use extraordinary diligence in examining the goods to see whether they conformed to his order or not. Ordinary diligence is that diligence which men usually exercise in their business; and in this case it is the province of the jury to determine what ordinary diligence required. If ordinary diligence did not require the defendant to measure the hats, they being sent marked with certain sizes, then there was no acceptance by him because he did not measure them. And if, on opening the box containing the caps, he would not then discover by ordinary diligence that they were improperly sized, the fact that he did not open the box sooner than he did did not amount to an acceptance. The defendant was not bound to discover those defects which escape ordinary diligence. If the plaintiff sent the defendant a less quantity of the goods he ordered than he did order, the defendant had the right to accept them or not at his option. And if with a less quantity of goods than the defendant

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ordered of the kind he did order, the plaintiff sent him certain other goods of a kind he did not order, the defendant had the right to retain those of the kind he did order and return those which were not of that kind."

The court did not so charge the jury, but charged them as follows:

"In this case the plaintiff claims to recover the sum mentioned in the bill of particulars as the balance due him from the defendant on the bill of goods mentioned in the bill of particulars. He claims that the goods were ordered by the defendant and that they were delivered to and accepted by the defendant on the 16th of October, 1883. The defendant admits that he gave an order, that on the 16th of October he received the quantity of goods ordered, that he kept the goods in his possession from the 16th day of October until the 15th day of November next following, without unpacking them or in any manner examining to ascertain whether they corresponded with the order he had given or not; that on the 15th day of November he opened the package for the purpose of making a sale; and he claims that when he opened the goods he found that they did not correspond in size to the marks on the goods and that some of them were not of the sizes ordered and did not correspond with the order he had given, and that thereupon he measured the goods and returned to the plaintiff such as did not correspond with the sizes called for in the order.

"It is not claimed that the goods received by the defendant were different from the goods ordered by him except as aforesaid, but the defendant claims that they were not of the sizes ordered, were of no use to him, that he had a right to return them, and that he ought not to be obliged to pay for them.

"The plaintiff claims that the whole order is made up of entire orders or contracts, that the defendant waited an unreasonable time before examining the goods, and that under the circumstances the defendant had no right to return them, and that he (the plaintiff) is entitled to recover; all of which the defendant denies.

"You will observe that the larger order is made up of items or orders for a dozen or a fraction of a dozen of goods, and the court charges you, as a matter of law, that each of these items or orders for a dozen, or a fraction thereof, is a separate or entire contract; that the defendant could not retain a part of the goods received in response to any one of these orders and return the remainder without rendering himself liable for the whole of that particular order; and that with reference to any one of the orders, if the goods or any article sent in response thereto, did not correspond to the order, the defendant had the right to elect either to accept or reject all of the articles or goods sent in response to that particular order, provided he made his election within a reasonable time.

"Whether the goods returned by the defendant constituted all of the goods covered by any one or more of these entire contracts, is a question of fact for the jury to determine from the evidence.

"If you find that any or all of the goods delivered in response to any one of these separate orders did not correspond to that order, and that the defendant returned or offered to return all of the goods covered by that particular order within a reasonable time, then with reference to that order you will find for the defendant; but if you find that they were not all returned, or that they were all returned but not within a reasonable time, then you will find for the plaintiff on that particular order, and you are to decide upon each of these separate orders by itself.

"What is a reasonable time is a question for the jury and to be determined in view of all the evidence and circumstances attending each case; what would be reasonable time under one set of circumstances might not be in another. You will take into consideration the order given, when given, the time when the goods were received, the nature of the goods, the season for selling them, the acts of the parties, and all the circumstances, and view the matter in a common sense and reasonable light."

The jury returned a verdict for the plaintiff, and the de-

fendant appealed to this court, assigning as error the charge of the court and the refusal to charge as requested.

E. P. Arvine, for the appellant.

1. There was no ground for charging, as matter of law, that each item of a dozen or half dozen hats constituted a separate order. An inspection of the order shows that it is much more probable that the purchaser could take as many or as few as he pleased of each kind of hats at the list price, and there was no evidence to the contrary. There is a definite price for each hat. *Young & Conant Manuf. Co. v. Wakefield*, 121 Mass., 92. Take the first item in question, " $\frac{1}{2}$ doz. rat high college," it is made up of one No. 6 $\frac{1}{8}$, two No. 7, two No. 7 $\frac{1}{8}$, and one No. 7 $\frac{1}{4}$ hats, and each of these is quite as fully a separate order. At the most, the question whether they were entire orders should have been left to the jury.

2. The plaintiff has endeavored to treat this as an attempt to rescind on account of a breach of warranty; but it is a very different matter. According to the defendant's claim, the plaintiff sent him *different articles* from what he ordered, not the same articles of a different quality. A No. 6 hat and a No. 7 $\frac{1}{4}$ hat are no more the same article than are a peck and half-bushel measure. To send too many hats of the same size, or hats of the wrong size, is a failure to fill the order as much as to send twelve hammers upon an order for six hatchets and six hammers. The text books and cases everywhere recognize the difference between a breach of warranty, upon which in some states the contract may be rescinded, and in others damages may be recovered only, and a failure to fill the order, in which case the contract is entirely void. Benjamin on Sales, § 426, note *m*, and cases cited; Story on Sales, § 148 and notes; *Gardner v. Lane*, 12 Allen, 44.

3. Even if these items of dozens or parts of dozens did constitute entire contracts, the court was certainly wrong in charging that all must be retained or paid for. It is elementary law that where part of the articles ordered are sent,

the sender may retain or return them at his option. The plaintiff having sent the defendant a part of the articles ordered, together with some not ordered, he had a clear right to return the residue. Benjamin on Sales, § 689, and note; *Smith v. Lewis*, 40 Ind., 100; *Gardner v. Lane*, 12 Allen, 44; *Levy v. Green*, 8 El. & Blackb., 575.

4. The goods were not irrevocably accepted until the mistake was discovered and a reasonable time had elapsed for returning them. The plaintiff represented that he had sent the articles ordered. He made this representation both by sending them in response to the order, and by marks upon them. The defendant was not bound to investigate as to whether he had told him the truth. He had a right to rely on his statement. Suppose in response to an order for six dozen hammers, a box is sent marked hammers, but really containing hatchets, and the purchaser lays it away until needed; has he acknowledged that they are hammers, and bound himself to retain the goods? If goods are not such as were contracted for, his duty is to return them *immediately upon discovering their insufficiency*, or to give notice thereof to the vendor. Story on Sales, § 405, and cases cited. If the sender has sold part *before discovering the deficiency*, he may still rescind the sale and will be liable for the market value of what he does not return. *Shields v. Pettie*, 4 Comst., 122. In the kindred case of rescission for breach of warranty, allowed in some states, the reasonable time is to be computed *of course from the time the unsoundness is discovered*, and not from the date of the contract. Story on Sales, § 406, and cases cited. In determining this question, the fact that the plaintiff had incorrectly marked them so as to apparently conform to the order was the vital one. These marks were on the hats as well as on the boxes. If he had opened the boxes the marks on the hats would still have deceived him. The bearing of this fact on the question of diligence or reasonable time was included in the defendant's requests. The entire omission to refer to it was an omission of the most important point for the jury, and of itself constitutes ground for a new trial.

E. B. Gager, for the appellee.

1. Each of the items or orders for a dozen or a fraction of a dozen of goods was a separate or entire contract. An entire contract is one in which goods are sold as one lot, in a single sale and for one consideration, even though the price is to be ascertained by the number of pounds or articles in the lot. "If the contract is entire, if it is one bargain, then it matters not whether there are one or many articles, and though each may have an appropriate price." *Clark v. Baker*, 5 Met., 459. "The entirety of the contract is not destroyed by the circumstance that the subject of sale is of such uniform character as to be readily divisible proportionally, by weight or measure, or is contained in packages of uniform quantity and value, even with the added circumstance that the consideration is named only by way of fixing the rate or price of the unit of such division." *Mansfield v. Trigg*, 113 Mass., 350. See also 2 Parsons on Cont., 519; Benjamin on Sales, § 426; *Leonard v. Dyer*, 26 Conn., 177; *Miner v. Bradley*, 22 Pick., 457; *Morse v. Brackett*, 98 Mass., 205; *Young & Conant Manuf. Co. v. Wakefield*, 121 id., 92; *Smith v. Lewis*, 40 Ind., 98. In this case the goods were bought by the dozen; each order is given for the same quality, kind and style of caps; and there is no separate price for each, but one consideration—so much per dozen. Whether a contract is entire is a question of law for the court, and the charge was proper.

2. The defendant could not retain a part of the goods received in response to any one of the orders and return the remainder without rendering himself liable for the whole of that particular order. See cases already cited. Also 2 Parsons on Cont., 679; 3 id., 208; 5 Wait's Actions & Defences, 509; Benjamin on Sales, § 426.

3. It necessarily follows, from these two propositions, that if any portion of any of these separate and entire lots did not correspond to the order, and the defendant wished to rescind, all the goods specified in that order must be returned in a reasonable time, and conversely, if the defendant retained any of the goods mentioned in any of the entire or-

ders, he is liable for all the goods in that order, and that he cannot keep part and return part. The defendant admits that he did not return all of any of the entire lots, but in each case kept some and returned some. This being true, he is liable for the balance claimed.

4. The defendant assigns as error that the court did not charge the jury, as requested, that if ordinary diligence did not require the defendant to measure the caps under the circumstances, then there was no acceptance by the defendant because he did not measure them; and that if on opening the box the defendant would not discover by ordinary diligence that the caps were improperly marked, the fact of not opening the box sooner than he did did not amount to an acceptance. Taken in connection with the facts admitted on the record, there is nothing which justifies such a charge. Nowhere does it appear to be claimed or charged or implied that the defendant accepted the goods because of not measuring them alone. If ordinary diligence did not require measurement, then measuring or not measuring does not at all enter into the question of acceptance by unreasonable delay in examination. In such a case acceptance or non-acceptance would be determined independently of measurement, and the question of measurement has no bearing on the case. But the law is well settled that mere delay in examination beyond a reasonable time after an opportunity to examine, in itself will amount to an acceptance. *Kellogg v. Denslow*, 14 Conn., 420; *Treadwell v. Reynolds*, 39 id., 31; *Boughton v. Standish*, 48 Verm., 598. Acceptance by unreasonable delay is entirely independent of those things which ordinary diligence does not require, and the court rightfully refused to charge as requested. It was admitted that the goods were kept four weeks; an unreasonable time on the facts. The court charged fully and fairly on the question of reasonable diligence and the defendant has no just ground of complaint.

5. It was not error for the court not to comment on the bearing and weight of evidence where no comment was made on any of the evidence, as in this case. But the defendant

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did not request the court to comment on this subject, and therefore cannot take advantage of any failure to do so. *Waters v. Bristol*, 26 Conn., 398; Thompson on Charging the Jury, 581.

6. The case is too trivial to be sent back and tried over. Only \$38 is involved, for it is conceded that the defendant owes us \$4.50. In *Buddington v. Knowles*, 30 Conn., 26, this court said that a verdict for \$66 should not be set aside even for error, on account of the trivial amount involved. See also *Hull v. Bartlett*, 49 Conn., 64; *Sheldon v. South School District*, 24 Conn., 90.

LOOMIS, J. The complaint seeks to recover the price of merchandise, consisting of hats, caps, collars and gloves, sold and delivered to the defendant pursuant to his written order, which is annexed to the finding as an exhibit. The order classified the goods wanted according to the kind and style—each class occupying a line by itself, on which was given the size and over it the number desired of that size; at the left the numbers were summed up in fractions of a dozen, and at the extreme right the price of a dozen was given. Take, for example, the first line in the order, which also in part involves the matter in dispute:—

" $\frac{1}{2}$ doz. rat high college $6\frac{1}{8}$, $7\frac{2}{8}$, $7\frac{2}{8}$, $7\frac{1}{4}$\$18.50"

The goods were sent in boxes, accompanied by the plaintiff's bill, which on its face showed a full compliance with the order. The bill had also a printed heading:—"All claims must be made within three days after receipt of the goods." The defendant kept the goods about a month before he had occasion to open the boxes, and then for the first time discovered that some of the caps were not of the size required by his order and not of the size indicated by the labels thereon, and such goods he returned to the plaintiff, who refused to receive them, on the ground that each dozen or fraction of a dozen was an entire contract which must be rescinded *in toto* or not at all, and also that the offer to return was not made within a reasonable time; and

therefore he claimed to recover for all the goods originally delivered. The court, as matter of law, in its charge to the jury adopted the first mentioned claim of the plaintiff, and as the defendant conceded he did not return all of any one of the classes consisting of a dozen or fraction of a dozen, a verdict against him was inevitable.

In thus applying the law which the plaintiff invoked as to the entirety of contracts the court was doubtless influenced by such propositions as are laid down in *Clark v. Baker*, 5 Met., 459, and *Manafield v. Trigg*, 113 Mass., 350. It is not our present purpose to discuss the propositions referred to, nor to examine and apply the nice distinctions that obtain as to the divisibility of contracts.

In *Manafield v. Trigg* the court, while holding that a sale of a specific number of packages of an article at a given price per package was an entire contract, also held that "the rejection and return of an article of a different kind or description, not answering to the terms of the contract, do not stand upon the ground of this decision, nor does the right to return them depend upon the existence of a warranty."

The defect claimed was not one of quality, but of size in respect to hats and caps. The suggestion is now made that as the extent of variation did not appear it might have been trivial, but no such point was made in the court below. The court in its ruling assumed that the claimed variation was so substantial that, if it existed as to each article composing the class, the whole might have been returned. The finding shows that the defendant on his part distinctly claimed that the variation in size was such that the articles rejected were of no use to him. We shall therefore assume for the purposes of this discussion that the variation was substantial and not trivial and immaterial. We can readily see that it might have been so material as to render the article returned a different thing from that specified in the order, so as to come within the rule last suggested. It must be borne in mind that the identity of a thing within the meaning of the rule does not depend on its being of the

Cohen v. Pemberton.

same class or kind, but rather on its adaptation to the wants and uses of buyers.

The local merchant presumably has his regular customers, who require hats and caps of definite sizes; and he makes his order on the wholesale dealer with reference to this and to the probable demand. If one of the retailer's customers sends to him for a $7\frac{1}{4}$ hat, and one is sent, so labeled, but which proves to be a $6\frac{3}{4}$ or even a 7 in size, it would at once be conceded that the customer could reject it as a very different thing from what he ordered. A difference which is so material between the retailer and his customer, must also be important as between the wholesale and retail merchant.

In *Gardner v. Lane*, 12 Allen, 44, *A* undertook to pay *B* a debt by delivering to him a hundred and thirty-nine barrels of No. 1 mackerel. *A* delivered part No. 1 mackerel, and forty-six barrels of No. 3 mackerel. *B* actually received the mackerel but did not open the barrels. *C*, a creditor of *A*, attached the No. 3 mackerel as *A*'s property. *B* undertook to affirm the sale, claimed the property as his own, and replevied it. On the trial *C* claimed that no property in the No. 3 mackerel had passed to *B*, as the claimed delivery was a non-performance. *B* claimed that the difference between No. 3 and No. 1 was a difference in quality, and that the title did pass subject to his right to rescind. The court held the difference between No. 1 and No. 3 mackerel to be a difference in kind, and that no title passed to *B* in the No. 3 mackerel, because his contract for sale was for articles of a different kind, and that he had never assented to receive the No. 3 mackerel by reason of his want of knowledge; and so the attaching creditor held the goods.

In *McEntyre v. McEntyre*, 12 Iredell, 79, and in *Waldo v. Halsey*, 3 Jones (Law,) 107, the proposition is stated as everywhere admitted to be law, that "if one, not having seen them, orders goods of a certain description at a certain price, and the goods do not answer the description, he may return them or offer to return them within a reasonable time." In the last mentioned case the order was for bags

of a certain size, and the only defect was that they were of less size.

If then we should concede that the order for each dozen or fraction of a dozen was an entire contract, and that the hats or caps sent were materially different in size from those ordered, the plaintiff himself was in default as to his contract, and could not recover anything, except for the fact that partial performance had been accepted and full performance waived by the act of the defendant. It seems to us that the court should have charged the jury in substance according to the defendant's request referred to in his fifth assignment of error.

It is suggested that the application of the principle under consideration might work injustice to the plaintiff by compelling him to deduct the proportionate price of a single article returned when the contract estimated the price only by the dozen, but a more critical examination of the contract found in the defendant's order and the plaintiff's acceptance of it, as indicated in his bill rendered, will lead to a different construction.

So far as the disputed items are concerned there is no instance where an entire dozen is ordered, and the price for a dozen is always given, whether the fraction is large or small, but the plaintiff's bill carries out the proportionate price. In two instances only one article of the class is ordered and it is entered as $\frac{1}{12}$ of a dozen, (we refer to the item "colored beaver gloves") and yet the price of the dozen is given, namely, \$54; but in the plaintiff's bill, in addition to the price per dozen, the charge is carried out as \$4.50, being precisely $\frac{1}{12}$ of the price per dozen. We think there is enough appearing to justify the inference that the statement in dozens was merely for convenience in accounting, and that the parties understood the order to mean the same as if each separate article was itemized and carried out at a sum indicated by taking one twelfth of the price given for a dozen. We think therefore the consideration by the true construction of the contract was susceptible of division and apportionment.

Our reasoning has a bearing also on the question whether the contract was entire or divisible, which, as we have already indicated, we do not intend to decide.

The remaining question relative to a reasonable time for returning the goods rejected has no importance except with a view to another trial, for as under the charge of the court and the conceded facts the defendant could not return the goods at all, there was no occasion to consider the question of reasonable time for such return. The presumption is that the jury did not pass upon the question. But had it been before them the charge as given would seem to be correct. It was as follows:—"What is a reasonable time is a question for the jury and to be determined in view of all the evidence and circumstances attending each case. What would be reasonable time under one set of circumstances might not be in another. You will take into consideration the order given, when given, the time when goods were received, the nature of the goods, the season for selling them, the acts of the parties, and all the circumstances, and view the matter in a common sense and reasonable light."

In a matter within the exclusive province of the jury, if the questions of fact are fairly submitted to them, it is not error for the court to omit all comment upon the bearing and weight of the evidence.

It has been suggested that, as the printed heading of the bill sent to the defendant required that "all claims must be made in three days," and none were in fact made for a month, the question of reasonable time must be decided adversely to the defendant. As no reference was made to this fact in the court below and no claim was predicated upon it, we are not required to comment upon it. With a view however to another trial it may be well to say that, as the case is presented, these words formed no part of the contract between these parties, and the defendant was not thereby limited to the time mentioned to make his objections to receiving the goods. The case of *Beane v. Tinkham*, 14 R. Isl., 197, fully supports this position.

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There was error in the ruling complained of and a new trial is ordered.

In this opinion PARK, C. J., and CARPENTER and GRANGER, Js., concurred.

STODDARD, J. It does not appear to be found as a fact that a description of hats and caps by the number as expressing the size has such a definite and precise meaning, even in that trade, that a hat or cap called seven and a quarter is a different thing, either actually or as understood by the trade, from a similar hat or cap called seven and an eighth; and it is found that the defendant admitted that he had no way of telling what the variation in size was. As this court can exercise jurisdiction to revise questions of law only, I think it can not, by assuming that the articles in question were different things, say as matter of law that the court below erred in treating the claimed variations as immaterial. I therefore can not concur in the opinion of the court.

 SAMUEL B. JOHNSON vs. WILLIAM E. HIGGINS.

The act of 1885 (Session Laws of 1885, ch. 7,) which authorizes a judge, after his term of office has expired, to make a finding of facts in an appealed case that had been heard and determined by him, is valid.

Whether he would not have had the power without that statute, under the act of 1882 (Session Laws of 1882, ch. 50,) which gives parties the right to appeal and makes such a finding necessary on the appeal:—*Quære*.

Where there are several counts embracing distinct and independent causes of action, it is the duty of the court, if requested by either of the parties, to direct the jury to bring in separate verdicts on the separate counts.

A general verdict will ordinarily suffice to ascertain and fix the particular rights in issue, and where it will is proper.

The loading of an appeal with irrelevant matter commented on.

[Argued June 10th—decided June 26th 1885.]

ACTION for damages for taking and carrying away the plaintiff's goods; brought to the Court of Common Pleas,

58	230
72	612
58	236
78	444
58	236
76	688

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and tried to the jury before *Torrance, J.* Verdict for the plaintiff, and appeal by the defendant. The case is sufficiently stated in the opinion.

H. G. Newton and *J. H. Whiting*, for the appellant.

C. S. Hamilton, for the appellee.

STODDARD, J. A plea in abatement is filed in this court. The finding and statement of rulings in the court below was not signed by the judge until the 10th day of April, 1885, and the judge had previously and on the 7th day of March, 1885, resigned his office. It is now contended that the act of signing the finding and statement upon appeal was a judicial act, and must have been done by the judge while in office. Upon the 31st day of March, 1885, a statute law took effect, which fully empowered the judge to make and sign the finding and statement after ceasing to hold office. This is admitted; but it is said that the act in question is beyond the power of the legislature, and is unconstitutional. Even if it be admitted that the act of the judge in signing the finding on appeal is a judicial act in the sense claimed by the plaintiff, and that the act was done after he had ceased to be such judge, no authority has been brought to our attention denying the legislature the power implied in the law in question. Similar legislation, and of more embracing scope, has for many years been operative, unchallenged, in reference to the judicial power of justices of the peace. No substantial reason is given why the legislative power is incompetent to authorize judicial officers, after their term of office, to complete the history of trials had, and to give permanent and official form to facts found during their term of office. Such acts are rather clerical than judicial.

But the constitutional term of office of the judge who tried this case below extended to June 30th, 1885, so that the questioned act of the judge was done during his lawful term of office, and the legislature certainly may empower the judge to perform the acts complained of until the expiration

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of his term of office, notwithstanding the fact that the judge has sent his resignation to the governor of the state.

The signing of the finding and statement in this case is so far from being an illegal act that it may admit of serious question whether, even without the enabling legislation passed in 1885, the judge would not only have the power, but the duty might be imposed upon him by the law as it now stands, to complete the finding and statement upon appeal without reference to his term of office.

By the statute of 1882 regulating appeals (Session Laws of 1882, chapter 50,) when a notice of appeal is properly made, the law imperatively commands the judge, under certain circumstances (and the case in question presents such circumstances), to make such finding as may be necessary to properly present the case for revision upon appeal, and the appeal need not be filed until after such finding or statement is made by the judge and filed with the clerk; and execution is to be stayed "until the expiration of the time hereinbefore fixed for filing the appeal." Under this law a party has an absolute, unqualified right to take an appeal upon complying with the terms of the statute, irrespective of any act on the part of the judge, and the appeal is perfected without his sanction. Formerly, and under the practice as it existed before the passage of this act, it was otherwise, and no case could, by motion for a new trial, be taken to the Supreme Court without the presiding judge's allowance of the motion. Under this former practice it was ruled that, with no statute permitting such act, the judge had no power to allow a motion for a new trial after his resignation had taken effect. *Griffing v. Town of Danbury*, 41 Conn., 96. In other words, the court ruled that the law had provided no way by which a party could go to the Supreme Court with a motion for a new trial except such motion was allowed by a judge while in office. The law now does not require such sanction by the judge to give the Supreme Court jurisdiction. The requisite statement of facts proved and of rulings made upon the trial in the court below is merely clerical, is absolutely imposed by the law as a duty upon the

judge trying the case, is demanded by the rights of litigants, and is essential to the due administration of justice. Unless required by principle or precedent courts would hesitate to rule that a person holding the office of judge can, by resigning his office, defeat the plain mandate of the law and the due administration of justice, and deny litigants appealing to the law their undoubted and material rights. At all events, and not to pursue this subject further, we are all of opinion that the statute of 1885, before referred to, fully warranted the act of the judge in sending the case to this court.

As to the merits of the cause. It appears that the defendant is a deputy sheriff, who, acting by authority of a lawful writ of attachment, and under directions of a resident attorney, who as such attorney was acting for non-resident parties, attached certain goods in a store as the property of one Otto Cytron. The plaintiff claimed title to the goods and right to possession of the store through a claimed sale by Cytron to him. The defendant denied the sale, attacked the good faith of the plaintiff and Cytron, and insisted that there had not been that open, visible, manifest, continued and exclusive change of possession necessary to protect the property from attachment by the creditors of Cytron.

In the original, amended, and supplemental complaints are three counts, each complaining of separate and distinct wrongs. The first and second counts are for acts alleged to have been done willfully, maliciously, and without color of right. The third count alleges simply wrongful acts. The first count is for taking possession of the goods, and thus breaking up the plaintiff's business; the second count is for taking possession of the store, and thereby destroying the business of the plaintiff; and the third count is for keeping possession of the store for an unlawful period. The plaintiff sought punitive damages for the acts claimed to have been done maliciously and unlawfully, damages for the illegal acts of the defendant as deputy sheriff in making the attachment, and, finally, damages for taking goods of the plaintiff in a lawful manner for the debt of another.

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It is manifest under these circumstances and claims that it was important for the defendant to know whether any possible verdict to be rendered against him was because he had acted in an illegal manner in making a lawful attachment, or whether the verdict was based upon acts done with personal malice and unlawfully, or whether the verdict was given against him simply because he was attaching under orders of the attorney for the plaintiffs in the suit against Cytron the property of the plaintiff for the debt of Cytron. The defendant's right of indemnity might depend upon the ascertainment of the basis of the verdict, and so counsel for the defendant requested the court "to inquire of the jury upon what grounds their verdict was based, and which issues were found for the plaintiff, and the amount of damages upon each;" also, to direct the jury to render their verdict upon the issues framed upon each count of the complaint. Upon the plaintiff's objection the court refused so to inquire or direct.

It is the practice, if the rights of the parties so demand, to direct the jury to find upon each separate issue, when separate and independent claims are to be determined by distinct issues; and when separate and distinct matters of substantially different character and nature are litigated and to be determined by separate issues, it is the right of the parties to have the verdict follow and answer the issues; especially so when other rights and obligations may depend upon the verdict. In *Newell v. Roberts*, 13 Conn., 73, the court say:—"We are not prepared to say that the verdict in this case, founded upon this charge, would not do entire justice to the parties in the cause. But in its consequences it may injuriously affect their rights, as the facts found may be made use of beyond the present suit. The parties had chosen to go to issue upon distinct pleas alleging distinct facts, although mostly tending to one point. Under these circumstances they had a right to an expression of opinion from the triers upon each of these distinct points." Judge LOOMIS, in giving the opinion in the recent case of *Morris v. Bridgeport Hydraulic Co.*, 47 Conn., 291, states the rule as follows:

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"When there are several counts for distinct and independent causes of action, or when there is no evidence at all applicable to some of the counts, it would doubtless be the duty of the court to comply with such a request." And the practice obtains generally in this state rather to direct the jury to return verdicts upon each of several distinct counts embracing independent matters, than to obtain the required information by inquiry of the jury, or by framing special verdicts, although both of the two latter modes have been resorted to.

It is not intended to hold that in all cases where claims are stated separately the verdict must specify the particular count or counts upon which it is found. A general verdict will frequently, and perhaps ordinarily, ascertain and fix the rights and obligations of litigants, and when this is manifest general verdicts are proper. The rule above stated has always obtained in this state, and, since the enactment of our recent practice act, and the adoption of the method of pleading thereby provided, it is more important, and in consonance with the spirit of that act, that this rule should be complied with in all cases where the rights of the parties demand it. There is error in this particular.

A new trial must be advised also for error in the charge to the jury in at least two particulars. In the first place, the evidence in the case and the claims of the parties called for a full and explicit statement to the jury of the law in relation to the necessity of an open, visible, and apparent change of possession. This was not sufficiently given. Nor do we think the charge in relation to the damages can be justified. There are some rulings upon evidence which are questionable, but mostly of an extremely technical character. It is hardly possible that the questions made in the trial below will be again made upon the new trial. The trial seems to have proceeded in quite an extraordinary manner, for in the defendant's original appeal he alleges thirty-eight reasons of appeal, and then supplements his original list with a line of sixteen more reasons, most of them tech-

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nical, some frivolous, and some well taken. The case in itself is simple, mainly of fact, involving a small amount, and yet, owing to the method of trial, the finding on appeal fills ten and a half pages of printed matter, exclusive of a copy of the charge to the jury. The case is loaded with statements that might well have been omitted, and evidently both the trial court and this court have been compelled to deal with a mass of practically irrelevant matter before being permitted to determine the rights of the parties. There is no new principle of law involved in the questions raised, except in reference to the form of the verdict, which has been disposed of, and as they all consist in contests whether a perfectly well settled rule of law was or was not properly applied to the facts, evidence, and claims of the parties, they do not require comment.

A new trial is ordered.

In this opinion the other judges concurred.

MARTHA A. BRISTOL, EXECUTRIX, *vs.* GEORGE D. BRISTOL
AND OTHERS.

A testator made the following bequest:—"I authorize my executrix to disburse from my estate to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all five thousand dollars." Held to be invalid.

If the gift had been of the amount to her, with authority thus to use the money, it would have been valid.

It could not be made a trust, as the beneficiaries were wholly uncertain and the payment to them left wholly to the pleasure of the executrix.

A gift of personal property that lapses goes to the residuary legatees.

The testator, after making sundry bequests, gave all the residue of his estate to certain trustees and their successors, as a permanent fund, the income of which was to be applied as follows:—An annuity of one hundred dollars to *E. C.* for her life; of the remaining income, one half to the New Haven Orphan Asylum, one eighth to the New Haven Home of the Friendless, and one eighth to the Connecticut Humane

53	242
60	513
53	242
64	51
53	242
65	56
53	242
73	63

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Society, with the following provision as to the remaining quarter:—"I authorize, empower and direct my wife to permanently dispose of the same for such charitable purposes as she may deem proper." Held—

1. That this provision was void for uncertainty as to the charitable purposes intended, while it could not take effect as a gift to the wife.
2. That the bequest was not saved by a written designation made by the widow of certain charitable purposes which she selected.
3. That the invalidity of the disposition of this quarter of the income, did not invalidate the gift of the other three quarters.
4. That the quarter of the fund, the disposition of the income of which was held invalid, went to the heirs at law as intestate estate.
5. That the heirs would take a quarter of the principal of the fund and not of the income.
6. That the annuity to *E. C.* with which the whole fund was primarily charged, could be apportioned, and three quarters of it assigned to the three quarters of the income going to the charitable societies, and one quarter to the quarter of the fund taken by the heirs.
7. That the executors could retain an ample portion of the quarter of the fund going to the heirs, to secure the quarter of the annuity to *E. C.*

[Argued June 9th—decided December 14th, 1885.]

SUIT for advice as to the construction of a will and as to the validity of certain bequests in it; brought to the Superior Court. The following facts were found by the court:

Julius D. Bristol died on the 29th of August, 1884, possessed of a considerable estate, real and personal, and leaving a will, of which the following parts are important to the present case. He made his wife, Martha A. Bristol, his executrix:

"*Item eleventh.* I hereby authorize and empower my executrix hereinafter named to disburse and give (in furtherance of my wishes expressed to her at sundry times,) from my estate to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all the total sum of five thousand dollars.

"*Item twelfth.* I give and bequeath all the rest and residue of my estate of every name and nature and wherever the same may be situate, unto William T. Bartlett and Edward A. Chatfield, both of the city and county of New Haven, Connecticut, and Edward W. Twitchell, of South-

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ington, Connecticut, and their successors to be designated and appointed as hereinafter set forth, as a board of trustees, to hold, invest, re-invest, manage and preserve as a permanent fund in trust for the uses, purposes and subject to the directions by me herein set forth and for the objects herein indicated, which fund shall be called The J. D. Bristol Benevolent Fund of Southington, Connecticut, and the object of the trust is to provide a permanent fund with a perpetual income, from which income shall be paid the annual annuities hereinafter given and set forth.

"I do hereby direct said board of trustees to pay from the interest, income and profits accruing from said fund, the sum of one hundred dollars annually to Emeline Cook, of said town of Southington, during her natural life. I do hereby further direct that the residue and remainder of said interest, income and profit accruing from said fund shall be annually divided by said board of trustees and paid as follows, viz: One half of said remaining interest, income and profit shall be paid annually to the New Haven Orphan Asylum, a body politic and corporate and located in New Haven, Connecticut. One eighth of said remaining interest, income and profit shall be paid annually to the Home of the Friendless, a body politic and corporate and located in New Haven, Connecticut. One eighth of said remaining interest, income and profit shall be paid annually to the Connecticut Humane Society, a body politic and corporate and located in said state of Connecticut. And I do hereby authorize, empower and direct my beloved wife, Martha Amelia Bristol, to permanently dispose of, for such charitable purposes as she may deem proper, the other one fourth of said remaining interest, income and profit accruing from said permanent trust fund."

The will then provided for the appointment of successors to the trustees named and for a perpetuation of the board of trustees.

The second item of the will gave the widow \$40,000. The third item gave \$30,000 to his son George D. Bristol, who was his sole heir at law, and who was the defendant in

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the case. Items four to ten were minor bequests to individuals of sums ranging from \$200 to \$1,250. The whole estate amounted to \$169,428.

The widow, on the 18th day of May, 1885, made and filed in the probate court the following instrument, intending thereby to make a permanent disposition for charitable purposes of the fourth of the income of the trust fund, of which by the will she was empowered to designate the charitable objects:

"To William T. Bartlett, Edward A. Chatfield and Edward T. Twitchell, trustees under the will of Julius D. Bristol, deceased, and to their successors:

"I, Martha Amelia Bristol, widow of the said Julius D. Bristol, deceased, in virtue of the power and authority conferred upon me by the twelfth item of said will of said deceased testator, to permanently dispose of, for such charitable purposes as I may deem proper, the one fourth of the interest, income and profits accruing from the trust fund created by said twelfth item of said will, do hereby designate and appoint The Hartford Hospital, in the city of Hartford, to be applied by the directors thereof to the humane purposes of the department in said institution known and designated as The Old Peoples' Home, and The General Hospital Society of Connecticut, located in the city of New Haven, as the corporations to which said one fourth of said interest, income and profits accruing from said fund shall be annually divided by said board of trustees, and paid as follows, viz: one half of the interest, income and profits accruing from said trust fund to each of said corporations. Dated at New Haven this 18th day of May, 1885. MARTHA AMELIA BRISTOL."

The questions raised by the plaintiff and as to which the advice of the court was sought, were as follows:—

1st. Whether the authority and power given in the eleventh item of the will to the executrix of the testator to disburse or appropriate a sum not to exceed in all five thousand dollars, is or is not a valid bequest.

2d. In the event of this bequest being adjudged to be

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invalid, whether said sum of five thousand dollars or any part thereof, and if so what part, falls into the rest and residue of the estate or becomes intestate estate.

3d. Whether the provisions, devises, trusts, and powers granted and created under the twelfth item of the will, or which it was sought or intended to grant or create by that section, are valid or invalid, and which of them are valid and which invalid.

4th. In the event of any of the provisions, devises, trusts, and powers granted and created by said section, or which it was sought or intended to grant thereby, being adjudged to be invalid, then to whom and in what proportions said rest and residue of the estate will go and of right belong.

The case was reserved by the court for the advice of this court.

J. K. Beach, with whom was *J. S. Beach*, for the plaintiff.

1. The bequest in the eleventh item of the will is valid. It clearly does not create a trust, but is an authority to the widow to take \$5,000 from the estate and use it for such benevolent purposes as she pleases. As the use of it can not be enforced by a court of equity, she takes it with only a moral obligation to use it as the testator requested. The matter is committed to her conscience and there it is left by the courts. *Robinson v. Dugate*, 2 Vernon, 181; *Morice v. Bishop of Durham*, 9 Ves., 399; *Bardswell v. Bardswell*, 9 Sim., 320; *Bull v. Bull*, 8 Conn., 48; *Gilbert v. Chapin*, 19 id., 345; *Harper v. Phelps*, 21 id., 257. Even if the title does not thus vest in the widow as a legatee, yet the bequest will be sustained as a power of appointment and disposition over the fund. In *Wait v. Huntington*, 40 Conn., 9, the court say that "it is familiar law that a testator may confer on executors and on others absolute power of appointment and disposition over his property."

2. The twelfth item of the will creates a valid trust. As to the provision directing the trustees to pay over one half the income to the New Haven Orphan Asylum, one

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eighth to the Home for the Friendless, and one eighth to the Connecticut Humane Society, no criticism is anticipated. The testator "directs" his wife "to permanently dispose of" the other fourth "for such charitable purposes as she may deem proper." It is not left to her discretion to dispose of this one quarter or not to dispose of it; she is "directed" to do it. Nor is she allowed to scatter it in private charity from year to year as the impulse of the moment directs; but her choice is to be made but once and for all time. She is to dispose of it "permanently,"—that is, to some institution or institutions of a "permanent" character; thus clearly and necessarily limiting the executrix to a choice among public or corporate as distinguished from private and individual *cestuis que trust*. The character of the *cestuis que trust* is still further limited by the testator to those existing for "charitable purposes." To such purposes only is the executrix allowed to dedicate the remaining one quarter of the fund. The proposition for which the complainant contends then appears to be this: That a testator may devote the income of a trust fund to public charitable purposes, and may direct his executor to nominate from that class of beneficiaries one or more permanent *cestuis que trust*. But the case of *Coit v. Comstock*, 51 Conn., 353, recently decided by this court, holds with careful precision and clearness that when the intention of the testator to create a public charity is clearly expressed, and a mode of selection from a definite class of beneficiaries is provided, the trust will be sustained. In this case it will be observed that the *administration* of the charity is not given to the testator's wife. She is but his authorized agent to elect a "permanent" institution existing for "charitable purposes," to whom the income of the fund shall ever thereafter be paid by the trustees. The actual administration of the charity to the ultimate beneficiaries is conducted by such institution; and the wife's duty is once for all performed by a simple nomination. All the machinery of the trust is complete. The trustees are appointed and their duties defined; the fund is set apart, and the intention to dispose of it in support of some public

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charity clearly expressed. One thing only remains, to-wit: to nominate the specific public charity to which the fund should be applied. This the testator authorizes and directs his wife to do. And unless a court of equity will forbid her to exercise this power of nomination, the trust is valid, and has already been made effective by the nomination of the Hartford Hospital and the New Haven Hospital, to receive in equal shares the one fourth part of the income of the trust fund created by the twelfth item of the will.

J. Halsey and *A. Brandegee*, for George D. Bristol, the heir at law.

1. It is a settled principle of Connecticut law that a gift to charity will not be upheld unless—1st, the general objects of the charity are defined with reasonable certainty; and, 2d, a mode is provided by which the particular beneficiaries of the trust may be ascertained. *Greene v. Dennis*, 6 Conn., 299; *Bull v. Bull*, 8 id., 48; *Langdon v. Plymouth Congregational Society*, 12 id., 114; *Brewster v. McCall's Devisees*, 15 id., 277; *Am. Bible Society v. Wetmore*, 17 id., 181; *White v. Fisk*, 22 id., 50; *Town of Hamden v. Rice*, 24 id., 355; *Treat's Appeal from Probate*, 30 id., 116; *Proprietors of White School House v. Post*, 31 id., 240; *White v. Howard*, 38 id., 354; *Adye v. Smith*, 44 id., 67; *Hughes v. Daily*, 49 id., 34; *Crum v. Bliss*, 47 id., 603; *Fairfield v. Lawson*, 50 id., 513; *Coit v. Comstock*, 51 id., 379. The Connecticut doctrine has been recognized and adopted in the state of New York. *Levy v. Levy*, 33 N. York, 100; *Bascom v. Albertson*, 34 id., 593; *Prichard v. Thompson*, 95 id., 79. The last case closely resembles the one now before the court. All the authorities agree that if the trust attempted to be created is so vague and indefinite as to be incapable of judicial administration, it is void. *Perry on Trusts*, § 729; *Harper v. Phelps*, 21 Conn., 270; *Adye v. Smith*, 44 id., 67; *Crum v. Bliss*, 47 id., 603; and the cases above cited from the 33d, 34th and 95th N. Y. Reps.

2. The execution of the power of disposition by the

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wife does not cure the radical defect in the will. This is precisely the course adopted in *Adye v. Smith*, 44 Conn., 61. The finding in that case shows "that the executor was ready and desirous to dispose of the fund for certain benevolent purposes selected by him." But the court held that such a defect could "not be cured by *any action* on the part of the trustee, for the testator must for himself define the objects of his bounty, *and cannot delegate this power to another.*" And at the close of the opinion: "If such purpose had been specified in the will it would have been valid. But no action or statement on the part of the trustee can avail *in the least* to cure a radical defect in the will. It is the will of the testatrix, *not that of the trustee*, which is to stand or fall, and to use the language of Sir William Grant, in *Morice v. Bishop of Durham*, the question is not whether the trustee *may* apply the estate upon purposes strictly charitable, but whether he is *bound* so to apply it." So also in *Crum v. Bliss*, 47 Conn., 603, the court say—"The will must be carried out as made if it is to be carried out at all."

3. The bequest in the eleventh item of "such sum, not to exceed \$5,000, to disburse to such worthy objects as she may deem proper," is, if possible, still more objectionable, on all the grounds above stated. It is not given to charity, nor even to benevolence. It is uncertain both as to amount and as to objects. It would not be sustained either in England or Massachusetts. All the authorities condemn it. The doctrine of *cy pres* has never been stretched to cover such an indefinite disposition as this. *Adye v. Smith*, 44 Conn., 69; *Chamberlain v. Stearns*, 111 Mass., 267, and cases there cited.

4. The bequest in the twelfth item of the will being of portions of the income, and not of the *corpus* of the fund, if inoperative as to any portion, the whole bequest is void. The trust is entire, and cannot be enforced in part. *Levy v. Levy*, 38 N. York, 97; *Commonwealth v. Levy*, 23 Gratt., 21. The object of the trust is stated in the will to be "to provide a permanent fund, with a perpetual income, from

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which income shall be paid the annual annuities hereinafter given and set forth." The estate is thus given to the trustees and their successors in perpetuity, to divide the income therefrom annually, and pay it over in the proportions named, and to the institutions named, and for the purposes to be designated. If the disposition is void as to any of the portions, it cannot be divided among the other beneficiaries, for, by the terms of the bequest, they are only to receive aliquot portions of the whole income. If the bequest had been of aliquot portions of the fund, instead of the income, this difficulty would not arise. But as it is, the difficulty affects the entire trust for the reason stated, and for the reason that the fund is to be held in perpetuity, and the uses to which a portion of the income is to be applied are not within the provisions of the statute permitting a perpetuity. *Coit v. Comstock*, 51 Conn., 386. The bequest of the remaining quarter of the income, if void, does not fall into the residue. "Residue means all of which no effectual disposition is made by the will, other than the residuary clause; but where the disposition itself fails, to the extent to which it fails, the will is inoperative." *Skrymsher v. Northcote*, 1 Swanst., 566; *Cheslyn v. Cresswell*, 3 Bro. P. C., 246; *Bagwell v. Dry*, 1 P. Wms., 700; *Page v. Page*, 2 id., 489; *Leake v. Robinson*, 2 Mer., 363, 392; *Sykes v. Sykes*, L. R., 3 Ch. App., 301; *Sohier v. Inches*, 12 Gray, 385. The bequest in the eleventh item being void, the legacy therein named falls into the residue. If the bequest of the residue in the twelfth item or any portion is void, such estate is intestate.

C. R. Ingersoll, for the charitable societies named in the twelfth clause of the will.

First. A valid trust is created by the provisions of item twelfth of the will. By it the testator bequeaths the residue of his estate to trustees, in perpetuity, for certain charitable purposes therein indicated. Subject to the life annuity of \$100 to Emeline Cook, the income of the trust fund is directed by the testator to be annually divided between

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certain charitable institutions, namely, the New Haven Orphan Asylum, in the proportion of one half, the Home of the Friendless and the Connecticut Humane Society, each in the proportion of one eighth, and the remaining one fourth part the testator "directs" his "beloved wife, Martha A. Bristol, to permanently dispose of for such charitable purposes as she may deem proper." It is objected that the trust estate is not within the statute relating to charitable uses and therefore is not secured to the uses to which it has been granted "according to the true intent and meaning" of the testator, because his "true intent and meaning" as to the disposition of the remaining one fourth of the income, (after the appropriation of the other three fourth parts to the charitable institutions named,) is so vaguely and uncertainly expressed that the law cannot effectuate it; and that consequently the entire trust must fail.

1. We submit, in the first place, that there is no such difficulty in ascertaining the intention of the testator; and that, on the contrary, his intention is clear to devote the entire income of the trust fund (saving only the life annuity) to certain "charitable" purposes within the purview of the statute. What he meant by charitable purposes is clear. Whatever popular significance the word "charitable" may have, the testator seeking to raise a trust, in perpetuity, for charitable purposes, must be presumed to use it in the sense of the statute. For otherwise his bequest would fail, and his intention could not be carried out. "If there are two meanings of a word, one of which will effectuate and the other will defeat the testator's object, the court is bound to select that meaning of the word which will carry out the intention and objects of the testator." *Whicker v. Hume*, 7 H. L. Cas., 154; *Saltonstall v. Sanders*, 11 Allen, 455. The word "charitable," in our court of chancery, as in that of England, has a "well known and acknowledged meaning." *Hamden v. Rice*, 24 Conn., 350. "A technical meaning." *Adye v. Smith*, 44 Conn., 71. And this is the meaning of the word in our statute. That meaning has been concisely expressed as "a gift to a general public use which extends

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to the poor as well as the rich," or "whatever is given for the love of God, or for the love of your neighbor in the catholic and universal sense," as distinguished from that which, in its motive, is "personal, private or selfish." *Jackson v. Phillips*, 14 Allen, 555. And it is this sense that courts of chancery give to the word when seeking for the intention of a testator in the construction of wills. Solely for the want of this word the court were not able to discern the testator's intention in *Adye v. Smith*. But the presence of the word enabled the court to sustain the trust in *Schouler, Petitioner*, 134 Mass., 426. And this statutory meaning has such force that it will give its own sense to other words of a different legal sense with which it may be united. A gift to "charitable or benevolent" purposes is a good charitable gift in Massachusetts, "whose system of jurisprudence relative to trusts for charity is similar to our own," as this court say in *Adye v. Smith*. *Saltonstall v. Sanders*, 11 Allen, 446; *Rotch v. Emerson*, 105 Mass., 431; *Chamberlain v. Stearns*, 111 id., 267; *Suter v. Hilliard*, 132 id., 412. The sense in which the testator used the word is also indicated by the character of the other institutions which are, in the context, made his beneficiaries, in perpetuity. They are "charitable" institutions in the statutory sense.

2. The purpose of the trust being certain and lawful, the beneficiaries are also made certain; and the trust can therefore be executed and administered by a court of chancery. In *Coit v. Comstock*, 51 Conn., 379, this court say that where a definite class of beneficiaries is described, and a mode is provided for the selection of the particular objects of the bounty, the uncertainty is reduced to certainty. The mode provided by the present testator for their selection is not only a very certain one, but is otherwise commendable. He leaves that duty to his wife—the one most likely to be possessed of his wishes, and he, at the same time, gratifies himself by testifying in this becoming manner his confidence in her. In *Brown v. Kelsey*, 2 Cush., 243, the devise was "for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing

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the Middlesex Union Association," and it was held sufficiently certain, and the appointees of the association took the bequest. In *Wells v. Doane*, 3 Gray, 201, the devise to such charities as should be deemed most useful by the executor of the life tenant was held good. In *Waldo v. Caley*, 16 Ves., 206, the charitable objects were such as "my said wife shall judge most worthy and deserving." And see cases cited in *Saltonstall v. Sanders*, (*supra*).

8. But if the provision respecting the one fourth remaining part of the income should fail, the other trusts of item twelfth would be unaffected by it. "Where a will contains different trusts, some of which are valid and others void or unauthorized by law, or where there are distinct and independent provisions as to different portions of the testator's property, or different estates or interests in the same portions of the property are created, some of which provisions, estates or interests are valid and others invalid, the valid trusts, provisions, estates or interests created by the will of the testator will be preserved; unless those which are valid, and those which are invalid, are so dependent upon each other that they cannot be separated without defeating the general intent of the testator." *Van Vechten v. Van Veghten*, 8 Paige, 104, 120; *Irving v. De Kay*, 9 id., 521. In the present case the trusts are distinct, and, without any difficulty, separable. Nor is the general intent of the testator defeated by such separation. The claimed uncertainty attaches only to the remaining "one fourth part" of the income, and the only trust that can result to the heir at law by reason of such uncertainty is in respect to that one fourth part simply. There is no more difficulty in making the separation than there would be if the testator had expressly provided that the principal should be held for the beneficiaries, in separate portions, according to the proportions indicated. Indeed, the bequest of the interest or produce of a fund, without limitation as to time, is regarded as a bequest of the fund itself. 2 Roper on Legacies, 371; *Sprout's Appeal*, 105 Penr. St., 488.

Second. If item eleventh of the will is inoperative, the

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attempted bequest falls into the residuum. *Hayden v. Stoughton*, 5 Pick., 587; *Thayer v. Wellington*, 9 Allen, 295; *Greene v. Dennis*, 6 Conn., 292, 305; *Phelps v. Robbins*, 40 id., 250; *James v. James*, 4 Paige, 115.

LOOMIS, J. This case involves the construction of two clauses in the will of Julius D. Bristol and the question of their legality.

The eleventh clause of the will is as follows:

"I hereby authorize and empower my executrix to disburse and give (in furtherance of my wishes expressed to her at sundry times) from my estate to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all the total sum of five thousand dollars."

Is this a valid gift? It clearly is not a trust. There is no person or object named, or even hinted, as the *cestui que trust*. There is no person who could claim in a court of equity an enforcement of the trust. It is a case where, if the five thousand dollars had been given to the executrix to be disposed of at her pleasure, the law would regard the property given as vested in her, while the direction for its use was merely precatory and of no legal force. In such a case the law regards the legatee as taking the gift absolutely and with no enforceable duty as to its use.

But there is no gift to the executrix. She has merely a power of distribution. Nothing vests in her. It is precisely as if no disposition whatever of the fund had been suggested, but the executrix had been empowered to direct how five thousand dollars of the estate should go. It is, in other words, an authority given to a third person to direct how a part of the testator's property should be disposed of. If good for a part of the estate it would be good for the whole. Would then a will in the following words be a valid one: "I direct that A B shall declare how all my property shall be disposed of."

The supporters of this will say that such a will would be valid, and quote in support of their claim a dictum of Judge

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SEYMOUR in *Wait v. Huntington*, 40 Conn., 11, as follows: "It is familiar law that a testator may confer on executors and on others an absolute power of appointment and disposition over his property." But the case itself did not call for this remark nor involve the question of its correctness, and it seems hardly probable that the learned judge intended that it should have the wide application given it.

There is a singular absence of all reference to this question in the text books, and we have found no decisions that bear with any directness upon it. In the absence of such authority we should regard such a will as of no legal effect. We think the law never intended to accept as a valid will so vague and indefinite a direction, such a mere authority: It is in no proper sense a will. It indicates no intent whatever on the part of the testator as to the disposition of his property. It is really a public declaration that he has no such intent. It is a travesty of terms to call such an instrument a will.

The bequest being inoperative, the five thousand dollars appropriated by it falls into the residue. This is the well-settled rule in the case of void bequests of personal property. *Greene v. Dennis*, 6 Conn., 292; *Thayer v. Wellington*, 9 Allen, 295; *James v. James*, 4 Paige, 115.

The remaining question arises under the twelfth clause of the will, which is as follows:

"I give and bequeath all the rest and residue of my estate of every name and nature whatever and wherever the same may be situated, unto William T. Bartlett and Edward A. Chatfield, both of the city and county of New Haven, and Edward W. Twitchell of Southington, Connecticut, and their successors to be designated and appointed as hereinafter set forth, as a board of trustees, to hold, invest, reinvest, manage and preserve as a permanent fund, in trust for the uses and purposes and subject to the directions by me herein set forth and for the objects herein indicated, which fund shall be called The J. D. Bristol Benevolent Fund of Southington, Connecticut, and the object of the trust is to provide a permanent fund with a perpetual in-

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come, from which income shall be paid the annuities hereinafter given and set forth."

The testator then gives one hundred dollars a year from the income of the fund to Emeline Cook, during her natural life, and directs that, from the remainder of the income, there shall be paid one half to the New Haven Orphan Asylum, one eighth to the Home of the Friendless in New Haven, one eighth to the Connecticut Humane Society, and the remaining quarter he disposes of by the following clause:

"And I do hereby authorize, empower and direct my beloved wife, Martha Amelia Bristol, to permanently dispose of, for such charitable purposes as she may deem proper, the other one fourth of said remaining interest, income and profit accruing from said permanent trust fund."

It is very clear that this is not a gift to the wife herself, which she can take discharged of the trust, as it merely gives her a power to appoint the charitable use. Is it then valid as a gift to charitable uses under our statute on that subject?

Whatever might be held on this question by the courts of England, or of those states which have adopted the English doctrine on the subject, it is very clear that under our own decisions, which have established a definite rule on the subject in this state, this bequest can not be held valid. It is well established with us that a gift to a charitable use must designate the particular charitable use by making the gift to some charitable corporation, whose charter provides for a charitable use of its funds, or to some particular object or purpose that the law recognizes as charitable. It is enough if the object be mentioned, and the law can see that it is a charitable one; but it is not enough that the gift be merely "to charitable uses" or "to be used in charity," so long as no selection is made from the long list of recognized charitable objects. And it is not enough that some person is named to whom is given the power of naming the charity. That is the testator's own matter. It is his intent that is to determine that. If he chooses to leave the matter wholly to the discretion of some person named, he can do so by making

the gift to him, leaving him to use his discretion as to the disposition of it. In this case the donee takes absolutely, and the law does not trouble itself as to whether he acts conscientiously in the matter. The testator has chosen to leave the matter to uncertainty and there the law leaves it.

The charitable object, thus required to be named, may be a benefit to a class of persons and therefore uncertain as to the particular persons of the class that are to receive the benefit. This uncertainty may make the bequest void, unless there is a power given to some person or corporation to make a selection of the individuals. *White v. Fisk*, 22 Conn., 50; *Adye v. Smith*, 44 id., 70; *Fairfield v. Lawson*, 50 id., 513; *Coit v. Comstock*, 51 id., 379; *Tappan's Appeal from Probate*, 52 id., 412. Here the power given the widow is not to select the particular beneficiaries of a class named, but to select the charity itself. We think that, to uphold this bequest, we should have to go beyond the utmost limit to which we have gone in upholding charitable gifts.

The bequest being of such a character, it clearly can not be saved by the act of the widow in making a written designation of the charitable purposes which by it she is authorized to select.

If this gift can not be sustained, then it is claimed that the entire trust fund falls with it.

But the principle to be applied is well settled, that where a trust is for several purposes, some valid and some invalid, it will be supported so far as it is good, provided such part is separable from the rest and no violence will thereby be done to the testator's general intent. 3 Jarman on Wills, (Am. ed.,) 709; 1 Redfield on Wills, 428; *Sears v. Putnam*, 102 Mass., 9; *Benedict v. Webb*, 98 N. York, 460. But the case of *Coit v. Comstock* 51 Conn., 352, was cited in argument to show that the trust was inseparable. In that case however the annual income of the trust fund was to be expended, so much as might be necessary, in putting and keeping in good order certain burial lots and monuments, and the remainder for the support of religious services in connection with the ecclesiastical society that was named as

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trustee. The bequest for the care of the burial lots was invalid, but it was not separable for the reason that it was impossible to tell how much of the income would be required for the burial lots or that it might not take the whole and leave nothing to be applied to the valid charity.

In the case at bar it is admitted that if the residue were given, in different portions, to different objects, each would be independent of the others, and a failure of any one of them would not affect the others. But it is said that here the gift is of different portions of the *income* only, so that the shares, being shares only of a common income, can not be severed in advance, or in any other way except by a division of the income. The question raised here is not without practical difficulty. It is of course out of the question that the quarter of the income should *in perpetuo* be distributed to the heirs at law. If the quarter is set apart for them at all, it clearly must be in the principal. The testator, whose intent is to govern so far as practicable, clearly intended that the benefit of three quarters of the fund should go to the charitable institutions named. This plain intent clearly should not be allowed to fail if there is any way by which the quarter share of the heirs at law in the income can be severed from the rest. This can only be done by a division of the principal of the fund, setting aside for distribution as intestate estate one quarter of it, and preserving the other three quarters for the trust fund. This can do no possible injustice to any party interested, unless the part set to the heirs should increase in value, making the income from it larger in proportion than that from the trust fund, in which case the charitable institutions would be losers; or unless the trust fund should increase disproportionately in value, making a corresponding loss to the heirs at law. But the loss or gain on either side would probably be very small, while the chances are equal, and the advantage to both the trust fund and the heirs in thus severing their interests would be very great.

The matter stands at this point precisely as it would if a

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testator should direct that his property go into the hands of trustees and the income be divided into ten equal parts and paid over annually to "the following charitable corporations, one part to each;" and should then by mistake name only nine charitable corporations, leaving the tenth part undisposed of and therefore intestate. Now must all these nine charitable bequests, all legal in themselves, fail, simply for this oversight? The testator's one great intent was to give his property in charity, and not to give a dollar to his heirs, who were perhaps remote collaterals. Shall this great intent wholly fail, and the other non-intent completely succeed? This would be doing great injustice to the testator and great despite to his intent. What is the technical difficulty? Simply this—that if the fund is at once divided into ten parts and one part given to the heirs at law, these heirs may not get an exact tenth, or the other nine tenths may some time or other yield more than nine tenths of the income. If they yield less that is of course the loss of the charitable societies; but that is of no consequence, as they do not complain. The only complaint is from the heirs at law—that they may not get the full tenth. But the heirs have this advantage—they get their tenth of the fund down, at once, and at market value; so that they can at once turn it into money if they choose; while the other nine tenths are to be kept a long time and may in part be lost or reduced in value. In the whole matter the heirs have the advantage.

Now can it be that this small risk—not only very small, but very remote and merely speculative, is to be allowed to defeat the great prevailing, manifest, legal intent of the testator, and that too in favor of heirs at law to whom it was his clear intention to give nothing? Such a result would seem to be a reproach to the law.

It is true that this is a division of the principal, while the testator, in the case we are supposing, intended only a division of the income. But it is well settled that an absolute gift of all the income of property is a gift of the property itself. The donor in such a case retains nothing, and

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gives no interest to any other person than the donee. In the case before us the departure from the exact intent of the testator is only as to the mode of carrying out his cherished object, not a substitution of one object for another. There is nothing of the *cy pres* doctrine in it.

We think therefore that one quarter of the residue now devoted to the trust fund, should, upon a fair estimate of values, be separated from the trust fund and distributed as intestate estate to the heirs at law.

A question of some practical difficulty arises with regard to the annuity of one hundred dollars in favor of Emeline Cook, which is charged for her life upon the entire trust fund. It is clear that the reduced trust fund should pay but three quarters of this and that the other quarter should be paid from the quarter of the residue that goes to the heirs. This annuity is charged upon the whole residue and therefore as much upon the quarter that goes to the heirs as upon the three quarters that goes to the trust fund. Unless the parties agree upon some arrangement that shall dispose of this small charge, the trustees should retain, either the whole of the residue until Mrs. Cook's death, or an ample amount from the quarter distributed to the heirs to yield with certainty the sum of twenty-five dollars per year, the same to be distributed to the heirs at law upon the death of Mrs. Cook.

The claim is made in behalf of the charitable institutions taking under the residuary clause, that this quarter of the income, or of the principal if we so treat it, upon the legacy in question failing, goes into the residue, thus preserving the trust fund unimpaired and increasing their beneficial interest under it. But this clearly can not be so. The residue spoken of in the will is the residue after the payment of the preceding bequests, and clearly can not, either in law or reason, take back into itself a part of the residue itself that has dropped out by not having been legally disposed of. It necessarily becomes intestate estate.

CARPENTER and STODDARD, Js., dissented from so much

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of the opinion as held the bequest of the fourth of the income of the trust fund to charitable purposes to be designated by the widow invalid, but concurred in holding that the bequest of the other three fourths of the income to the charitable societies named was valid. PARK, C. J., and GRANGER, J., dissented as to the validity of the bequest of the remaining three fourths of the income of the trust fund. All the judges concurred in the opinion except as to the points of dissent noted.

WILLIAM W. FARNAM AND OTHERS, EXECUTORS, *vs.*
GEORGE B. FARNAM AND OTHERS.

A testator gave a large estate to trustees upon the following trust:—(1) Out of the net income to pay his widow during her life \$25,000 annually.—(2) To pay to each of his five children out of the net income \$5,000 annually during their lives.—(3) To pay to each of his grandchildren out of the income on their arriving at the age of twenty-one, \$5,000.—(4) During the ten years succeeding the death of the testator to allow the annual income, after the above payments, to accumulate, and to invest the accumulation as a part of the trust estate; and after the expiration of the ten years to pay two thirds of the net income annually to his children then surviving and the legal representatives of such as might have died, and allow the remaining third to accumulate and add it to the trust estate.—(5) At the decease of the last survivor of the children, if his widow should not then be living, but if living then at her death, the trust to cease, and all the estate to go to his grandchildren who should then be living, to be divided among them *per capita*; the children of any deceased grandchild to take the parent's share, and if any grandchild had died leaving a widow, but no children, such widow to take one third the share her husband would have been entitled to if living. Held—

1. That the grandchildren living at the time of the testator's death took a vested interest in the remainder of the trust estate.
2. That they took as a class—opening to let in after-born grandchildren, while, if any died before the time for distribution, without children and not leaving a widow, his title divested.
3. That the disposition of the property therefore did not conflict with the statute against perpetuities.
4. That the annuity to the children was payable to the family of a deceased child during the continuance of the trust.

53	261
53	571
53	261
60	510
53	261
63	281
63	304
53	261
65	56
65	514
53	261
68	210
53	261
71	291
53	261
75	506
53	261
78	461

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5. That the gift of two thirds of the net income after the first ten years was in addition to the annuities previously given to the children and not a substitute for them.
6. That by "the legal representative" of children, under the fourth head, was meant those who would take under the statute of distribution, meaning the widow and heirs at law.

[Argued June 11th—decided November 13th, 1885.]

SUIT by executors and trustees for an adjudication as to the construction and validity of a will; brought to the Superior Court. The following facts, set forth in the complaint, were admitted by the parties and found by the court:

Henry Farnam, of New Haven in this state, died in October, 1883, leaving an estate, mainly personal, of eighteen hundred thousand dollars, and a will, executed on the 22d of April, 1882, which was duly proved in the probate court after his death. He left a widow, and five children, four of the children being sons of the ages respectively, at the time of the testator's death, of forty-two, thirty-nine, thirty-seven and twenty-nine years, and one a daughter of the age of thirty-three; also fourteen grandchildren, all under the age of twenty-one. He was in his seventy-ninth year at the time of his death.

By the second article of his will he gave his widow the use for life of his homestead, with his furniture, books, pictures and other household effects, and his horses and carriages, and provided for the disposition of them, except the silverware and certain of the pictures, after her death. By the third article he distributed certain pictures and his silverware among his children. The remainder of the will is as follows:

"*Fourth.*—All the rest and residue of my estate of every kind and wherever situated I give, devise and bequeath to my wife, Ann Sophia Farnam, and my children, George Bronson Farnam, William Whitman Farnam, Charles Henry Farnam, Sarah Sheffield Farnam, wife of Eli Whitney, Jr., and Henry Walcott Farnam, and to the survivors and survivor of them, as joint tenants in fee simple, but in trust for the uses and purposes following, to wit:

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"1. Out of the net income and profits thereof to pay to my said wife, Ann Sophia Farnam, during her life, the sum of twenty-five thousand dollars, annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease. This bequest and that contained in the second article of this will is in lieu of her right of dower in my estate.

"2. The said trustees are, out of said net annual income, to pay to each of my children during their lives respectively, the sum of five thousand dollars annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease.

"3. The said trustees are out of said net annual income to pay to each of my grandchildren as and when he or she shall arrive at the age of twenty-one years, the sum of five thousand dollars.

"4. During the ten years next succeeding my decease the said trustees shall allow the said net annual income to accumulate (subject always to the payment of said annuities to my said wife and to my said children, and also to any payments to grandchildren as aforesaid), and invest the same as part of said trust estate, and said trustees after the expiration of said ten years shall pay two thirds of the net annual income of said estate annually to my children then surviving, in equal proportions; and if any of my said children shall have then deceased, his or her legal representatives shall be entitled to the share of said annual income that he or she would be entitled to if living; and said trustees shall allow the remaining one third of said net annual income to accumulate, and invest the same as part of said trust estate.

"*Fifth.*—At the decease of the last survivor of my said children, if my said wife shall not then be living, but if living, then upon her death, this trust shall cease, and I give, devise and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living, to be equally divided among them *per capita* and not *per stirpes*, and to their heirs forever; but if any grandchild of mine shall have died leaving a child or children sur-

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viving at the expiration of said trust, such child or children shall take the share that his, her or their parent would have been entitled to if living; and if any grandchild of mine shall have died leaving a widow surviving at the expiration of said trust, but leaving no child or children then surviving, such widow shall take one third of the share her husband would have been entitled to if living.

"*Sixth.*—I authorize and empower my said trustees and the survivors and survivor of them to sell and convey any property held by them in trust, real or personal, and to invest and re-invest the moneys of said trust fund at their discretion. The said trustees are to receive no compensation as such, but they are to be allowed a reasonable compensation for any service rendered, and are also to be allowed all their necessary expenses when away from home on the business of the estate.

"*Seventh.*—I constitute and appoint my wife, Ann Sophia Farnam, my sons, George Bronson Farnam, William Whitman Farnam, Charles Henry Farnam, and Henry Walcott Farnam, and my daughter, Sarah Sheffield, wife of Eli Whitney, Jr., executors hereof; and I direct that no bond be required of them, or of either of them, by the court of probate, either as executors or as trustees."

The complaint alleged that the following questions had arisen with regard to the construction, validity, and legal effect of some of the foregoing provisions of the will, as to which the plaintiffs asked the adjudication of the court.

1. Whether the trust created or sought to be created by the fourth article of the will is, taken in connection with the other provisions of the will, valid, legal and operative and capable of being carried out, and whether the trust estate thereby created, or which it was attempted to create, is now a valid and subsisting trust estate, and whether the provisions for accumulation in the fourth article are legal and valid provisions, and, if not, whether the other provisions of the fourth article or of article fifth are thereby inoperative and void, in whole or in part.

2. Whether the provisions of article fourth taken in con-

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nection with the provisions of the fifth article, suspend the power of alienation for more than two lives, either actually or by possibility, and whether, if the power of alienation be thereby suspended for more than two lives, the trust which was sought to be created by the fourth article is thereby rendered inoperative and void, and if so, to what extent.

3. Whether the trust estate sought to be created by the fourth article taken in connection with the fifth article is void, either in whole or in part, as in contravention of the statute of this state against perpetuities.

4. In the event of the trust being adjudged to be inoperative and void, in whole or in part, then to whom and in what proportion and in what manner that portion of the estate as to which said trust is adjudged to be inoperative (if any there be) shall be conveyed?

5. Whether any of the gifts, devises or bequests made, or sought to be made, in the fourth and fifth articles, are inoperative and invalid, and, if so, then to whom and in what proportions such parts of the estate granted by any of the provisions of the articles which are adjudged to be inoperative (if any there be) go and of right belong?

6. Whether in case of the death of a child of the testator at any time within the period of ten years from the testator's decease, the annuity of five thousand dollars given to such child by the second clause of the fourth article of the will would be payable to that child's legal representatives or heirs for the remainder of the period between such child's death and the expiration of the ten years, and, if so, to what representatives or heirs and in what proportions?

7. Whether the gift to each of the testator's children from and after the expiration of ten years from his decease of a *pro rata* share of two thirds of the net annual income of the trust fund annually, as provided in the fourth clause of the fourth article, is by way of substitution for the annuity of five thousand dollars given to each child by the second clause of the fourth article, or whether such gift of two thirds of the income to each child is cumulative and in addition to the annuity of five thousand dollars given to each child during his or her life.

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8. What is the construction and legal effect of the phrase in the fourth clause of the fourth article which reads as follows: "If any of my children shall have then deceased, his or her legal representatives shall be entitled to the share of said annual income, that he or she would be entitled to if living?" Does the phrase "legal representatives," as there used, mean executors or administrators of a deceased child taking the gift of the income as part of the personal estate of the child so dying, so as to vest a beneficial estate in the child so dying subject to disposition by will and liable for his debts? Or does the phrase "legal representatives," as there used, mean simply children or lineal descendants? Or does it mean those persons who upon a child's decease would be entitled to his personal estate according to the Connecticut statute of distributions in case of intestacy?

All persons interested were before the court either as plaintiffs or defendants. The defendants filed answers, admitting the facts alleged in the complaint, and setting forth their respective claims with regard to the construction of the will, and joined in asking for an adjudication upon the questions involved.

The case was reserved for the advice of this court.

L. H. Bristol, for the plaintiffs.

C. R. Ingersoll, for the heirs at law.

1. The will is, in its general scheme, in contravention of the statute against perpetuities. It is manifest that the general intent of the testator was to create, by the accumulation of his estate during the lives of his children, a very large fund which, in the course of the second quarter of the next century, should be distributed in fee among his descendants then living, of the third or fourth generations from himself; all of whom might possibly be, and many if not most of whom, in all reasonable probability, would be, persons not in being in 1882, nor the immediate issue or descendants of persons then in being. But this the law of this state will not allow. Gen. Statutes, p. 352, sec. 3. It is not enough

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that the estate may vest within the statutory period. It is now well settled both in this country and in England that the limitation of an estate to be valid, must be such that its vesting can by no possibility be postponed beyond the statutory limit. *Fosdick v. Fosdick*, 6 Allen, 43; *Rand v. Butler*, 48 Conn., 299; *Alfred v. Marks*, 49 id., 473; *Wheeler v. Fellowes*, 52 id., 238.

2. Is then this estate, limited over upon the death of the testator's last surviving child, one that must necessarily vest at some time in persons to whom the capacity to take is given by our statute? We submit that it will not necessarily so vest. The purpose of the trust, certainly a principal purpose, is to prevent any such vesting. That purpose is to provide for the accumulation of the income, so that the *corpus* of the estate which is to be subject to the limitation over shall be another *corpus* than that originally given to the trustees. And therefore the testator provides that upon the cessation of the trust, "I give, devise and bequeath all the estate which shall *then* be held in trust under this will to my grandchildren who shall *then* be living, to be equally divided among them *per capita* and not *per stirpes*." The intention that there should be no vesting of the estate until the trust had ceased is also apparent from the provision that in case of the death of any grandchild leaving a child, such child shall take the share its parent would have been entitled to if living. This provision would have been unnecessary if the share had already vested in the parent, for the child would be entitled to it by descent. And so the provision for the widow of a deceased grandchild would have been useless. For if there had been a vesting of the estate in the grandchild, the widow would have taken her moiety of her husband's share by the statute of distribution. It is true that this vesting of the estate in a person not having the statutory capacity can occur only in the event of a grandchild dying before the distribution in fee. But there is not only no "impossibility" of this event occurring, but its occurrence is in the highest degree probable, if not reasonably certain. And the will itself so regards it by providing for

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the contingency. In *Wheeler v. Fellowes* the court found that such an event might reasonably occur in eighteen years from the death of the testator and that "thirty-eight years was time enough for a grandchild born after a will to grow up and have children and grandchildren;" thus making three generations after the making of the will. It is also to be noted here that these great grandchildren and widows of deceased grandchildren take *directly by the will*, as in the cases supposed by the court in *Wheeler v. Fellowes*. Nothing, as we have seen, can have vested in the deceased grandchild, and therefore nothing can come to his children by way of substitution, as in the course of descent or distribution. It cannot, therefore, be said that the "class" which takes by the limitation over is the class of grandchildren, and that there is a gift over to another class, to wit, their children; and that although the gift over may be void, the gift to the original class will be good. There is but one class of takers by the will. It is constituted of the grandchildren then living, and the children of those who have before that time deceased. They all take *directly* from the will. This is made clear in the late English cases of *Bentinck v. Duke of Portland*, 7 L. R., Ch. Div., 693, and *Pearks v. Moseley*, L. R., 5 App. Cas., 714, in both of which cases the limitation over was like that in the will in question, and the claim we have just referred to was made and disregarded. Here, it is manifest, the ultimate amount of no one donee's share can be finally ascertained until it is known who are to take, and that cannot be known until the time for the distribution. *Sears v. Russell*, 8 Gray, 100. It is by no means certain that upon the event calling for the transfer of this estate by the trustees, there will be any persons then living to take it, according to the will, who have the capacity to take it by the statute. The court certainly cannot say that it is impossible that this will be so. But whether such persons be many or few is not material. If the vice of remoteness may exist in some of those persons to whom the limitation over is made, the court cannot say that it may not exist in all. Nor if it may exist in any can the court say in which of the

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takers it will be, and much less separate the sound takers from the unsound. For this reason it is that the rule is now well settled in the law of perpetuities, that the vice of remoteness affects a class as a whole if it may affect an unascertained number of its members. 1 Jarman on Wills, (5th Am. ed.,) 530; 2 Washb. Real Prop., (4th ed.,) 703; *Hall v. Hall*, 123 Mass., 120.

3. The limitation over of the trust estate being void, the trust created for the support of the gift over must fail. Undoubtedly when a will contains different trusts, some of which are valid and others invalid, or where the same trust contains different provisions some of which are valid and others invalid, the trusts and provisions will be preserved, unless those which are valid and those which are invalid are interwoven together and so dependent upon each other that they cannot be separated without defeating the general intent of the testator. *Irving v. DeKay*, 9 Paige, 521; *Smith v. Edwards*, 88 N. York, 104. The trust for the annuity to Mrs. Farnam is of this character. It is entirely independent of the general scheme of the will, and can be separated from the main body of the trust without interfering, in the least, with the general intent of the testator. The direction to the trustees to *invest* is of the "*net annual income*" after the payment of Mrs. Farnam's annuity. Otherwise there is no provision for her annuity after the ten years. But the trust which relates to the "*net annual income*" has for its object the very creation of the estate which is the subject of the void limitation over, and must therefore fall with it. *Harris v. Clark*, 3 Seld., 242; *Thorndike v. Loring*, 15 Gray, 391; *Sears v. Hardy*, 120 Mass., 524.

4. The phrase "immediate issue or descendants" in the statute is to be construed in the natural and ordinary sense of those words, that is, persons born immediately of persons in being. This is the construction uniformly given to the words by the courts of this state, and it is required by the obvious sense of the word "descendant," particularly when it is used, as it is in this statute, as a word descriptive of one taking by *purchase*. "A gift to *descendants* receives a con-

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struction answering to the obvious sense of the term; namely, as comprising issue of every degree." 2 Jarman on Wills, (5th Am. ed.,) 632. See also *Sears v. Russell*, 8 Gray, 100; *Baker v. Baker*, id., 101; *Van Beuren v. Dash*, 30 N. York, 393.

5. The annuity of \$5,000 payable to each of the children by the second paragraph of article fourth is, in case of the death of such child during the ten years next succeeding the testator's decease, payable to the legal representatives of such child. The testator could not have intended to leave the family which such deceased child might have without the provision he had made for it during such child's life. This is plain by the provision, to be found in paragraph fourth of the same article, in case of the death of such child *after* the expiration of the ten years. The supposition that he intended such provision after the ten years but not before, is too unreasonable to be entertained.

6. The gift to each of the children after the expiration of ten years from the testator's decease, of a *pro rata* share of the net income as provided in the fourth paragraph of the fourth article, is not in substitution for the annuity of \$5,000 given by the second paragraph of the article, but is cumulative. The gifts being different in amount, the presumption is that they were intended to be cumulative. 2 Redf. on Wills, 178. The language of the testator forbids any other construction. It shows an intent that the three payments, 1st, of \$25,000 annually to the widow "during her life," 2d, of \$5,000 annually to each of the children "during their lives respectively," and 3d, of \$5,000 to each of the grandchildren on arriving at the age of twenty-one—are to be paid in any event, and before the process of accumulation is to go into operation.

7. The "legal representatives" intended by the will, in the fourth clause of the fourth article, must either mean the executors or administrators of the deceased child, or else those who would take his personal estate according to the statute of distributions in case of intestacy. *Primâ facie* the words mean "executors and administrators." And this

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meaning will only give way to a different intention to be gathered from the whole will. 2 Redf. on Wills, 82. The fifth clause does show that the testator had the intention to provide for a deceased grandchild's widow who should survive at the expiration of the trust. It is not reasonable to suppose that he intended to exclude the widow of a child dying during the continuance of the trust from some similar provision. But she will be left without any provision for her support whatever, unless the testator intended either to give the husband control over his beneficial interest, so that he can provide for her by will, or that such interest shall go to his "legal representatives" as they are pointed out by the statute of distributions—that is, the widow and children,—those who would "legally" take the property if he should die intestate. Such meaning will, therefore, be given to these words that the intention of the testator to make such provisions for the family of his children may be effectuated. "The statute of distribution governs in all cases where there is no will, and where there is one, and the testator's intention is in doubt, the statute is a safe guide." *Lyon v. Acker*, 33 Conn., 225.

J. W. Alling and *S. C. Loomis*, for the grandchildren of the testator.

1. The will of the testator is to have effect unless contrary to law, and if contrary to law, to lose effect only so far as the law is violated. 1 Redf. on Wills, 428; 3 Jarman on Wills, (Am. ed.,) 709. If this will offends the law, as to the class of great grandchildren and widows of deceased grandchildren, it satisfies the law that that class does not take. Their inability to take ought not to deprive a class who can take, whom the testator most sedulously designed to take, of their right to take. *In re Moseley's Trusts*, 24 Law Times, 260. There is no difficulty except as to possible widows of deceased grandchildren, and as to possible issue of grandchildren born since the making of the will and dying before the final distribution. The children or issue of grandchildren can take as the "immediate issue or descendants" of

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persons in being when the will was made. This point was expressly ruled under the statute of Ohio, which is a copy of ours, in the case of *Turley v. Turley*, 11 Ohio St., 173, and in a case just decided, under the same Ohio statute, in the U. S. Supreme Court. *McArthur v. Scott*, 113 U. S. Reps., 340. There plainly can be no other reasonable construction of the phrase "immediate issue or descendants," unless it be ruled that both expressions mean precisely the same thing. Surely a gift to a son for life, and at his death to his immediate issue or descendants, would be good, for the language follows the statute. Under such a will, if all the son's children were dead, leaving grandchildren, would not such grandchildren take as descendants? Such a construction would satisfy the demands of public policy concerning the vesting of estates; that requires that such estates must vest at least by the expiration of a life in being; it is not so particular in whom such estate vests, after the lapse of a life in being. If this will had provided that the final distribution should be among all his grandchildren then living, and to the issue of grandchildren alive at the making of the will but dying before distribution, such issue to take the grandchild's share, this clearly would have been good. Surely the provision as to the class of possible issue of possible grandchildren who should be possibly dead at the time of final distribution, is altogether too vague to affect the clear intent of the testator in regard to his grandchildren. We further say that there is no soundness in the rule, which seems established in the English courts, that if a gift is to the members of a class severally, as individual owners of personal property, or as tenants in common of real estate, and it is possible, and only possible, that there may be, at the time of the distribution, some members of the class who could not take as purchasers, therefore the gift shall fail as to all members of the class. The period of the suspension of vesting is precisely the same as if the gift had been confined to those who certainly could take at the time of distribution. If the gift had been so confined, and at the time of the distribution there should

be no persons of the required class to take (assuming that the gift is wholly contingent until the time of distribution,) the whole estate would, of course, vest in the heirs. How then can it be that, when the period of the suspension of the vesting is the same, the gift is wholly good *ab initio* in the one case, and wholly void *ab initio* in the other? What difficulty is there in measuring out the penalty of the offense against the statute of perpetuities, according to the nature of the offense? *Catlin v. Brown*, 11 Hare, 372; *Knapping v. Tomlinson*, 28 Jurist, 626. If it be so that the gift is void as to all the great grandchildren because void as to some of them, it may be perfectly valid as to the grandchildren who are alive at the expiration of the trust.

2. We contend that the shares of the grandchildren vested in interest upon the death of the testator, liable to open at any time before final distribution and let in subsequently born grandchildren, whose interest vests at birth, liable to be divested by the limitations over in case of death; which limitations are, in case of death leaving issue, in favor of such issue, and in case of death leaving no issue, by implication in favor of all the other grandchildren; and if in any case such limitations over are void, by reason of the statute of perpetuities, then no divesting takes place. A grandchild born since the making of the will, and dying, leaving children, suffers no divesting of his share, because the limitation over which causes such divesting is void. There is no difficulty in the claim that the class would open to take in subsequently born grandchildren. It is the general rule that wherever an estate vests in interest at the death of a testator in a class, but the distribution and possession are postponed, the class opens to let in subsequently born members up to the time of the distribution. *Loockerman v. McBlair*, 6 Gill, 179; *Walker v. Shore*, 15 Ves., 125. The principal contest will be on the question whether the shares of the grandchildren vest in interest before, or are wholly contingent until, the time of final distribution. It is impossible to advert to or reconcile all the cases on this subject. In *Duffield v. Duffield*, 1 Dow & Clark,

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297, Lord ELDON said that from *Boraston's case* down to that time (1829), the number of cases bearing upon the question when an estate became vested, was a hundred and seventy. In the same case BEST, C. J., said:—"In consideration of these circumstances, the judges from the earliest times were always inclined to decide that estates devised were vested, and it has long been an established rule for the guidance of courts at Westminster, in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition, precedent to the vesting, is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will." See also *Booth v. Booth*, 4 Ves., 399; *Farmer v. Francis*, 2 Bing., 151; *Kevern v. Williams*, 5 Sim., 171; *Oddie v. Brown*, 4 De Gex & Jones, 179; *In re Moseley's Trusts*, 24 Law Times, 260. The same rule is laid down in the American cases. That of *Nodine v. Greenfield*, 7 Paige, 544, was a case of a will of real and personal estate to a wife for life, with remainder in fee to the children of a brother who should be living at the time of her death, and to the issue of such of the children as should then have died leaving issue. It was held that children of the brother, in *esse* at the death of the testator, took vested interests in fee, subject to open and let in after-born children, and subject also to be divested by death during the continuance of the life estate of the widow. The case of *Williamson v. Field*, 2 Sandf. Ch., 538, contains an exhaustive review of the authorities. It was a case of a will to a grandson for life, and after his death to his lawful issue living at his death. It was held that the children of the grandson, all born after the death of the testator, took vested interests as they were born, liable to be divested by death before that of the grandson, and opening to let in after-born children of the grandson. See also 1 Swift's Dig., 102; *Shattuck v. Stedman*, 2 Pick., 468; *Doe v. Provoost*, 4 Johns., 61; *Cushney v. Henry*, 4 Paige, 345; *Moore v. Lyons*, 25 Wend., 144; *Campbell v. Rawdon*, 18 N. York, 415; *Downing v. Marshall*, 23 id., 366. Clearly it was not

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a vital thing in the testator's mind that the grandchild should be living at the time of distribution. There is nothing to forbid the idea that a grandchild had an interest as soon as born, for as soon as born he or she answered the required description of a grandchild. Besides, it is clear that the testator's principal idea was to preserve and increase the principal of his large fortune, as long as he reasonably could, but then to distribute it in possession, equally to his grandchildren and those who should represent dead grandchildren. There is not the slightest hint in the will of an objection to the estate vesting in interest in the grandchildren as soon as born, subject to be divested in the manner claimed. The phrase "then living" does not create a condition precedent; it only serves as a distinction between living grandchildren and the issue of dead grandchildren. *Bowker v. Bowker*, 9 Cush., 519; *Chew's Appeal*, 37 Penn. St., 23, 28. We say that, clearly, in this will it is the possession that is withheld until the life of the last surviving child, not the vesting of the right. There is no doubt but that there is no divesting of the right if the divesting limitation over is void. *Blease v. Burgh*, 2 Beav., 221; *Arnold v. Congreve*, 1 Russ. & Mylne, 209. And this construction is not contrary to the real intention of the testator. The grandchildren, who would then take a vested interest in the property, not subject to be divested, are the primary objects of the testator's bounty, and the clause in the will giving it over in case of the death of one of them, is simply to insure equality in the distribution among them. The construction for which we contend gives effect to the will in all contingencies, except as to those limitations over, if any, that are void; and in case of the void limitations it leaves the estate so that the parties whom the testator had in mind would probably get it by inheritance. For as the estate vests of right on the death of the testator in grandchildren, there can be no question about an offense against the statute of perpetuities. It is no violation of that statute, of course, if such vesting is not defeated by void limitations over, or not divested by unlawful subsequent conditions.

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3. We apprehend that in any event there can be no question but that each grandchild takes a vested interest in the several legacies of \$5,000, payable at twenty-one years of age, and in case of subsequently born grandchildren, such interest vests at birth, payable at twenty-one years of age. We think there is no divesting of such interest. *Storrs v. Benbow*, 3 De Gex., M. & G., 390; *Smith v. Edwards*, 88 N. York, 92, 109.

4. The \$5,000 per year to the children for life, is not *in addition* to the two thirds of the income. Assuming that the death of the last survivor of the children probably will not occur in forty-five years, and that one of the children may not survive the ten years, if the \$5,000 is to be in addition to two thirds of the income, it will probably result that the last survivor will have received \$175,000 more than will belong to the family of the first child who shall die. We think the true construction of the will, with reference to this \$5,000, is that the children take at least \$5,000 for life; after the ten years they take two thirds of the income, which probably will be more than \$5,000, but if it should be less than \$5,000, they will take at least \$5,000, but they do not take \$5,000 for life and two thirds of the income.

CARPENTER, J. The testator's will contains the following articles:—

“*Fourth.* All the rest and residue of my estate of every kind and wherever situated, I give, devise and bequeath to my wife, Ann Sophia Farnam, and my children, George Bronson Farnam, William Whitmore Farnam, Charles Henry Farnam, Sarah Sheffield Farnam, wife of Eli Whitney, Jr., and Henry Walcott Farnam, and to the survivors and survivor of them, as joint tenants in fee simple, but in trust for the uses and purposes following, to wit:—

“1st. Out of the net income and profits thereof to pay to my said wife, Ann Sophia Farnam, during her life, the sum of twenty-five thousand dollars annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease. This bequest and that

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contained in the second article of this will are in lieu of her right of dower in my estate.

"2d. The said trustees are, out of said net annual income, to pay to each of my children during their lives respectively, the sum of five thousand dollars annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease.

"3d. The said trustees are, out of said net annual income, to pay to each of my grandchildren as and when he or she shall arrive at the age of twenty-one years, the sum of five thousand dollars.

"4th. During the ten years next succeeding my decease, the said trustees shall allow the said net annual income to accumulate (subject always to the payment of said annuities to my said wife, and to my said children, and also to any payments to grandchildren as aforesaid,) and invest the same as part of said trust estate; and said trustees after the expiration of said ten years shall pay two thirds of the net annual income of said estate, annually, to my children then surviving, in equal proportions; and if any of my said children shall have then deceased, his or her legal representatives shall be entitled to the share of said annual income that he or she would have been entitled to if living; and said trustees shall allow the remaining one third of said net annual income to accumulate, and invest the same as part of said trust estate.

"Fifth. At the decease of the last survivor of my said children, if my said wife shall not then be living, but if living, then upon her death, this trust shall cease; and I give, devise and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living, to be equally divided among them *per capita* and not *per stirpes*, and to their heirs forever; but if any grandchild of mine shall have died leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her or their parent would have been entitled to if living; and if any grandchild of mine shall have died leaving a widow surviving at the expi-

ration of said trust, but leaving no child or children then surviving, such widow shall take one third of the share her husband would have been entitled to if living."

In the construction of this will several questions have arisen. It is claimed by the children of the testator that the fourth and fifth articles are inoperative, or substantially so, for the reason that they are in violation of the statute against perpetuities. This claim, if sustained, requires us to hold—1st, that no estate vests in the grandchildren until the death of the widow and all the children; and 2d, that it will then vest in a class composed of grandchildren then living and the children and widows of deceased grandchildren. The main question is, whether the estate in the grandchildren is a vested or contingent remainder. We use the terms "vested remainder," and "contingent remainder" as they have been frequently used in this state, as applicable alike to real and personal property. We do not deem it necessary in this case to make any distinction between the two kinds of property.

When, by the terms of this will, does the estate vest in the grandchildren? At the death of the testator, or at the death of the last survivor of his wife and children?

We think it vested in point of right on the death of the testator.

That courts will incline in doubtful cases to construe a devise or legacy as vested rather than contingent is a familiar and well settled rule. In some instances courts seem to have gone so far as to say that they will if possible construe it as vested. It is enough for our present purpose to say that we ought to give this will that construction if its language will fairly admit of it.

The bequest is not in terms contingent, nor is it so by necessary implication. That it may be so construed may be conceded. That it will bear a different construction, and that that is the better one, we shall attempt to show.

It will be noticed that the testator, as to the great bulk of his property, separates the legal from the equitable title; and that separation is to continue until the death of his

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widow and children. The naked legal title is vested in trustees; the equitable title to the principal and a large part of the income is vested in no one until the termination of the trust, unless it vests in the grandchildren. The testator has made no other disposition of it. The law will not favor a construction which suspends the title or holds it in abeyance.

That the testator intended that the grandchildren should ultimately have the property cannot be doubted. That he has not expressly postponed the vesting is equally clear. The doubt arises from the use of the word "then," referring to the time when the trust shall cease, in the fifth article:—"I give, devise and bequeath all the estate which shall *then* be held in trust under this will to my grandchildren who shall *then* be living."

It is contended, on the one hand, that the word, as first used, is used to indicate the time when the estate is to vest in point of right; on the other hand it is insisted that it merely indicates the time when it is to vest in possession. It is agreed that it points out the time when the legal and equitable titles merge, and when the estate is to be distributed; and we think it must be conceded that the connection in which it is used does not necessarily require us to say that it is used for the further purpose of indicating the time when the estate vests in point of right. But if it is left in doubt the rule referred to makes it a vested estate.

The word as used in the last clause does not refer to the estate, nor to the time of its vesting, but is used to designate the persons who are to take, and will be further noticed when we consider that branch of the case.

Another rule is, that if the limitation over depends upon an event which is sure to happen, and the persons who are to take can be ascertained during the continuance of the particular estate, the interest is vested. But if it depends upon an event which may or may not happen, or if it is uncertain whether any person will ever be in existence who can take, the estate is contingent.

Mr Redfield states the rule thus:—"From a careful ex-

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amination of the subject it will be found, we think, that the question of vesting or remaining contingent depends upon whether the conditions of the intervening estate determining and the estate over taking effect, is one that must happen some time, and so as to give effect at some period to the second estate, or may never happen. If the former, then the second estate in remainder will always be regarded as vested." Redfield on Wills, part 2d, p. 594. Again:—"A conditional bequest is where its taking effect depends upon the happening of some uncertain event." *Id.*, p. 661, citing 2 Wms. on Exrs., 1132, and 1 Roper on Legacies, 605.

The rule thus unqualifiedly stated makes this a vested remainder. The event on which the remainder is to take effect,—the death of all the trustees,—is sure to happen. Assuming that the grandchildren as a class, and they only, take the remainder,—a question we shall hereafter consider,—there is no difficulty in ascertaining at any time who are to take. The remainder is certain to vest at some time and a certain definite class is designated to take. Under these circumstances the law presumes that the testator intended that the remainder should vest presently. There is a present right of future enjoyment whenever the possession becomes vacant; and that right, coupled with the fact that the time for the enjoyment must come, clearly shows a vested interest.

Mr. Jarman's fourteenth rule is as follows:—"That the rule of construction cannot be strained to bring a devise within the rules of law; but it seems that where the will admits of two constructions, that is to be preferred which will render it vested." If this remainder is vested, the statute against perpetuities will not defeat it. Otherwise it may. To defeat this will we are obliged to interpret two of its provisions, concerning which the most that can be said is that they are doubtful and susceptible of a different interpretation, so as to make it invalid. In other words, we are required to give the benefit of all doubts to those attacking the will, and that for the purpose of destroying it; which is contrary to the rule.

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The words, "I give, devise and bequeath," import a present interest unless other provisions in the will clearly manifest a different intention. "When the will imports a present interest in the devisee, it is to be construed so that any condition in the same shall be held subsequent and not precedent." Redfield on Wills, part 2, p. 685.

"The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving at age or surviving some other person, or the like." *Everitt v. Everitt*, 29 N. York, 39.

It cannot be denied that the testator has used language importing an immediate gift in point of right; and we fail to discover in other parts of the will sufficient indications of a contrary intent.

Another rule,—of less weight perhaps, but still worthy of notice,—is, that when the only gift is in a direction to pay at a future time, and the will does not otherwise indicate a present gift, the remainder will generally be regarded as contingent. But where the terms of a bequest import a gift, and *also* a direction to pay at a subsequent time, the legacy vests at the death of the testator and not at the time of payment. *Traver v. Schell*, 20 N. York, 89; *Manice v. Manice*, 43 id., 303. Here are words importing a present gift, and also a direction to distribute at a future time.

Two cases in the state of New York will serve to illustrate and define this rule. One is that of *Warner v. Durant*, 76 N. York, 138. In this case the will gave to the executor in trust certain money, with directions to pay to *B* annually the interest on \$15,000 at seven per cent., and at the expiration of five years to pay over to *B* the principal sum of \$15,000. *B* died before the time fixed for the payment of the principal. The question was whether the legacy vested in *B* during his life. The court say:—"It is a general principle that when the gift is absolute, and the time of payment only postponed, time not being of the substance of the

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gift but relating only to the payment, it does not suspend the gift, but merely defers the payment. This principle will not act in this case to vest the legacy; for the gift was not, in the outset, to the legatee; and another rule is to be noticed. It is this:—Where there is no gift but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. Here the gift was at first to executors to hold in trust for five years; and at the expiration of that period to pay over to the legatee. But this rule does not act in this case; for there has been a distinction grafted upon it. It is this:—When the gift is to be severed *instantly* from the general estate for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed." And on that ground it was held that the principal sum of \$15,000 was severed from the general estate and vested in the legatee at the death of the testator.

In *Smith v. Edwards*, 88 N. York, 92, there were no words in the will importing a present gift,—but the legacy depended entirely upon a direction to the executor to pay over to the legatee a legacy at a future time. It was held that the legacy was contingent and did not vest until the time of payment. The court say:—"Where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift. 1 Jarman on Wills, 762. If that rule is arbitrary and inflexible it ends any further argument; for in the present case there was no immediate gift, made in distinct terms, separate and apart from the direction to divide and distribute. But while we have recognized the rule it has been with very important qualifications and exceptions which properly limit its force as a standard of construction. In *Manice v. Manice* (43 N. York, 369,) it was said that when the terms of a bequest import a gift, and also a direc-

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tion to pay at a subsequent time, the legacy vests and will not lapse by the death of the legatee before the time of payment has arrived. And in *Warner v. Durant* (*supra*) the general rule is declared to have an exception grafted upon it, that where the gift is to be severed *instantly* from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed. The doctrine of these cases confines the rule within the limitation of its precise terms. It applies only where, beyond the direction for future distribution, there are no words and no provisions which import a present or vested gift or indicate such an intent. It does not control where the language of the will, while not expressly saying 'I give and bequeath,' does yet plainly import a present gift intended to vest immediately without reference to the clause of distribution."

Smith v. Edwards was quoted approvingly by this court in *Wheeler v. Fellowes*, 52 Conn., 238; and it is an authority which supports that decision as well as this; for, an examination of the whole will in *Wheeler v. Fellowes* reveals this fact, that the gift over, which was held to be void, was found only in the direction to pay or divide at a future time. The question whether other provisions of the will indicated a present gift, and the question whether the remainder was vested or contingent, were not made and were not considered by the court. It was assumed by the counsel and the court that the remainder was contingent.

But we do not propose to decide this question wholly or principally upon legal and artificial rules. Those rules should never control the intention of the testator; they should only be used as aids in discovering that intention. In this as in other cases we should rely mainly on the language of the will itself. In doing so we must consider the terms of the whole will, having due regard to the condition and circumstances of the testator. It is to be observed that it is drawn with great care and technical accuracy.

Taking the whole will together, we think it is reasonably certain that the testator intended that his estate should vest in right, at once, in his grandchildren.

His general scheme is clear. In the first place he made ample provision for his widow; in the second place he made reasonable provision for his children; and in the third place he gave most of his property ultimately to his grandchildren. Secondary and incidental intentions may also be noticed. As to the great bulk of his property he intended to pass by his children—that they should not have the absolute ownership of it. He also intended to keep it together and have it accumulate as long as the rules of law would allow. Perhaps he was ambitious to live in his estate long after his death, and that the estate, when finally distributed, should be a very large one. Whether these purposes were wise or not it is not for us to say.

His disposition of his property seems to be an impartial one. But principally and prominently it appears that his grandchildren were the preferred objects of his bounty. His intention that they should ultimately receive by far the larger portion of his property is unmistakable. That is one of the leading features of the will. Now as a vested interest is better than a contingent one, it will not be presumed that he intended the latter, especially as no one is benefited by it; and if he did so intend, it threatens the practical destruction of the will. Every presumption is in favor of a vested interest; not only so, but the inference to be drawn from the manifest intention of the will points strongly to that conclusion.

Let us now examine the will more in detail.

In the third article he gives, upon the death of his wife, to each of his surviving children, five pictures, and his silverware and plate, and prescribes the method of distribution. His language is:—"Upon the death of my said wife I give and bequeath to each of my three surviving children, &c." Of course no question of perpetuity can arise in respect to these bequests; but the question whether the children took a vested or contingent interest is a perti-

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nent one. That they took a vested interest will hardly be doubted. The use of the pictures and silverware is given to the widow during life. The title to the remainder meanwhile is in no one unless it is in the children. It is no part of the trust estate, because it is to be distributed, in all human probability, long before the trust will terminate. As the title must vest in some one, and as the children are ultimately to have it, the law vests it at once in them.

The condition here implied is clearly a condition subsequent. Surviving the widow is not the condition on which the estate vests, but death during her lifetime is the condition on which it divests.

Now the language of the devises and bequests in the fifth article is similar to, and substantially identical with, the language in the third article, and must receive the same construction. If one gives a contingent estate the other does; if one gives a vested interest both do.

The fact that the net income, subject to the annuities, for ten years, and one third of it afterwards, is ultimately given to those who take the remainder, is some evidence that the testator intended a present interest, in analogy to the principle of those cases which hold that payment of the income to the remainder-man during the prior estate, indicates an intention to vest the remainder.

But aside from all collateral and indirect considerations, the language of the fifth article, when properly interpreted, gives a vested interest. "At the decease of the last survivor of my said children, if my said wife shall not then be living, but if living then upon her death, this trust shall cease; and I give, devise and bequeath all the estate which shall then be held in trust under this will, to my grandchildren who shall then be living, &c."

The grammatical as well as the legal import of the words "I give, devise and bequeath," gives a vested interest. The death of the last survivor of the trustees refers not to the time of vesting but to the time for the trust to cease. The words are not to be carried over so as to qualify the words of the gift. They are not repeated in connection

with the gift, nor even referred to by the use of the adverb *then*, as they might have been—"I *then* give, devise, &c.," but all reference to them is omitted, the sentence is complete, and it conveys to the professional mind a distinct and unequivocal legal meaning, a present gift. Time is in no sense attached to its substance.

Later in the sentence the word *then* is used—"all the estate which shall *then* be held in trust." But it is there used for the purpose, not of indicating the time when the estate is to vest, but for the purpose of pointing out the subject of the gift. The amount of the trust property is constantly increasing, and the nature and kind of property are liable to frequent changes. The design was to give *now* the property which may *then* exist.

Such changes and accumulations do not affect the *corpus*, so as to prevent the remainder from vesting. They are frequently, we may say generally, incident to trust estates, but they do not affect the title of the remainder.

The word "then" is again used in this connection:—"to my grandchildren who shall *then* be living." It is here used to point out the persons who are to take and not to indicate the time when the estate is to vest.

But it is said that the persons who are to take are the grandchildren then living, and that until that time arrives there is necessarily an uncertainty as to the legatees; and that this uncertainty makes the gift contingent. There would be more force in this reasoning if the testator's intent is to be inferred from this sentence alone. But the testator was careful to explain his meaning, for he adds:—"But if any grandchild of mine shall have died leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her or their parent would have been entitled to if living." And then follows a provision in favor of the widow, if a grandchild died leaving a widow and no children.

Taking the whole article together it is apparent that the testator intended that an interest should vest in each grandchild, and that the distribution should be on that theory.

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But it is insisted that if the interest vested it would descend by the statute of distribution to the widows and children, so that there was no occasion for the testator to provide for it; and that the fact that he did so is an indication that the estate does not vest. There is little force in this argument, for it frequently happens that property is disposed of in wills according to the statute. Besides, in this case the statute is not precisely followed; for if there are children the widow is excluded; and if there is a widow and no children, she takes one third instead of one half, as she would by statute.

By "my grandchildren then living" the testator evidently had in mind after-born grandchildren. His reasoning was this—I desire to give this property to my grandchildren; but if I say so, and say no more, it may be claimed that only those now living will take. But I do not mean that, and so for the purpose of including after-born grandchildren I will give it to those then living. He then discovers that the children of deceased grandchildren are excluded, and makes separate provision for them.

Thus it seems quite clear to us that the estate vested in the grandchildren as a class, opening to take in those subsequently born. Each grandchild then living, and each grandchild subsequently born, as he came into being, took an interest in the estate and a right to share in its distribution. That right and that interest can only be defeated by his decease during the continuance of the trust, leaving no widow and no children; and that is clearly a condition subsequent.

We cannot assent to the views urged by the counsel for the children, that there is but one class to take under the final distribution, and that that class is composed of grandchildren then living and children and widows of deceased grandchildren. Assuming all the provisions of the will to be operative, the grandchildren take equal shares *per capita*; all the children of a deceased grandchild, no matter how many, take but one share *per stirpes*; while each widow is entitled only to the fraction of a share. We are unable to

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comprehend how all these legatees, of different grades and taking as they do in different proportions, can be regarded as a single class. They are such only in one sense—they constitute all the beneficiaries. But that is not what is meant by a class gift. Ordinarily, a class is where several persons answering the same description sustain the same relation to the legacy.

In this case the whole property is given to the grandchildren. One word describes them all. Each takes one equal share in the property; each takes originally, and not by way of substitution or derivatively; and each takes absolutely.

On the contrary, the children of a deceased grandchild are to take contingently; they take derivatively and not primarily; they represent a deceased grandchild and together take but one share; they do not answer the same description; and their relations to the legacy are entirely different. So also with the widows; with this further suggestion, that they take severally and not collectively.

It seems to us that the first and primary class consists of grandchildren only. If all should live until the expiration of the trust, as is possible, they will take the whole estate, and great-grandchildren and widows will be excluded. Clearly then all cannot be embraced in one class. Contingently great-grandchildren may take, but as they take *per stirpes* they cannot take as one class. There must be as many classes as there are deceased grandchildren leaving children. Each class takes, not directly from the original property, but from a severed portion thereof. Each class therefore is distinct from and independent of the others.

The widows cannot be regarded as a class at all, as each takes independently of the others. They too do not take from the general legacy, the whole trust property, but each shares in a portion of it after it has been severed from the common fund. The share of each grandchild is distinct from the others, and becomes the subject of another division. Each widow is only interested in one share; she is a stranger to the others. And so the widows and great-grand-

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children are to share, not in the original distribution, but in a sub-distribution.

It would seem to follow from these considerations that each class of great-grandchildren must stand by itself, and that the gift to it may or may not be void under the statute against perpetuities; a question we refrain from deciding. Inasmuch as that question has not been fully discussed we think best to leave it to be determined hereafter. We apprehend however that it is not a question of very great practical importance, because the interest being vested in the grandchildren, their children and widows will take under the statute of distribution; and that may be quite as well for all concerned.

We also deem it inexpedient to consider whether this will, or any part of it, is inoperative under the statute of New York. That is a question which must ultimately be determined by the courts of that state.

Another question is, whether in case of the death of a child of the testator at any time within the period of ten years, the annuity of five thousand dollars given to such child would be payable to that child's legal representatives or heirs for the remainder of the ten years, and if so to what representatives?

The language of the second clause of the fourth article, construed by itself, would seem to require a negative answer; but taking it in connection with the other parts of the will we think the answer should be in the affirmative. A leading feature of the will is equality or impartiality. The testator's scheme studiously provides for equality among the children, and also among the grandchildren: If a child dies, leaving children, that equality will be seriously impaired unless the annuity is continued to his heirs.

The children of a deceased child are expressly put in the place of their parent in respect to two thirds of the net income after the expiration of the ten years. It would be strange if he intended that they should be upon a different footing for the time that might elapse between the death of a child and the expiration of the ten years in respect to the annuity.

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Again:—The testator, in providing for the accumulation of the net income, has taken pains to say that all the annuities shall first be paid from it. That is some indication that he intended that all the annuities should be paid for the whole period of ten years.

These annuities are manifestly given for present maintenance. We cannot presume that the testator would have deliberately cut off the family of a child from all participation in the estate upon the child's death. He has not done so expressly, and we are not disposed to do so by implication.

We think it may fairly be inferred from the general tenor of the will, considering all its provisions in the light of the attending circumstances, that the testator intended that the annuity should be continued to the heirs of a deceased child; and it seems to follow logically that it should be paid as long as the trust continues.

The gift of two thirds of the net income to each child is in addition to the annuity. The legacies are distinct, differing in character and amount, and both are given without qualification. Had it been intended that the latter should be substituted for the former, the testator would have said so. Instead of that he has expressly provided that the former, the annuity, shall be for life, and we fail to discover any indications of an intention that it shall cease at the end of ten years. Two different legacies will be presumed to be cumulative in the absence of any direction to the contrary.

The term, "legal representatives," in the fourth clause of the fourth article, is not to be taken in a technical sense. It was obviously the intention of the testator to provide for the family of the deceased child. That intention will be best effectuated by construing the words as meaning the heirs and widow—they being the ones to take under the statute of distribution. Both parties substantially agree in that construction, and the will seems to justify it.

In respect to the last three points considered, the will leaving each of them somewhat in doubt, we have endeavored to follow, as nearly as may be, the statute of distri-

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bution, believing that the will will bear that interpretation as well or better than any other, and that it will make the will more harmonious and consistent as a whole.

The Superior Court is advised as follows:—

1. That the grandchildren take a vested interest in the remainder of the trust property; and that they take as a class, opening to let in after-born grandchildren, and in case of the death of any one before distribution without children and leaving no widow, his title divests. Consequently no part of the estate is intestate by reason of the statute against perpetuities.

2. We deem it unnecessary now to determine whether great-grandchildren and the widows of grandchildren in any given case can take under the will.

3. We also deem it inexpedient to consider whether any part of the will is rendered inoperative by the laws of New York.

4. The annuity to children is payable to the family of a deceased child during the continuance of the trust.

5. The gift of two thirds of the net income after the first ten years is cumulative.

6. By, "legal representatives" is meant those who would take under the statute of distribution.

In this opinion GRANGER and STODDARD, JS., concurred.

PARK, C. J. (dissenting).—I cannot concur in the views expressed by the majority of the court in regard to the disposition of the principal of the estate contained in the fifth clause of the will in question. The majority hold that the principal vested by right in the grandchildren of the testator, as a class, at the time of the testator's death.

I think no estate in the principal could vest by the terms of the will before the death of the last survivor of the testator's children, and, if Mrs. Farnam should then be living, not before her death.

Although the testator had nearly two million dollars of property to bequeath to his wife, children and grand-

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children, still, not contented with dividing this enormous estate among them, he conceived and cherished the scheme of doubling the amount before any disposition of the principal should be made. This he sought to accomplish after his death by adding to the principal of his estate a large proportion of its yearly income till the death of the last survivor of his wife and children.

The testator was in the seventy-ninth year of his age when the will was made. He had five children then living, the eldest of whom was forty-one, and the youngest twenty-nine. It was highly probable, almost certain, that some one of them would live to be as old as himself—would live at least forty years after his death.

Such being the case, the testator must have expected that his great estate would, and therefore intended that it should, accumulate forty years at least before the time would arrive for the termination of the trust, and before the words "I give, devise and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living," would take effect.

I am wholly unable to see how it is possible for these words to convey, at the death of the testator, the beneficial interest in the principal of the estate, as the majority of the court hold. It seems to me the testator labored to make it clear beyond the possibility of a doubt, that the time when the bequest would take effect was when the trust should terminate at the death of the last survivor of his wife and children. Up to this time he had devised and bequeathed the legal estate in fee simple to his trustees by a previous clause in the will, and now, on the death of "the last survivor," &c., he declares that the legal estate in fee simple which he had transferred to the trustees shall terminate, and then he devises and bequeaths the entire estate, legal and equitable, in fee simple to his grandchildren who shall then be living, &c.

For greater precision and seemingly to put the matter beyond all doubt, he repeats the word *then* or its equivalent a number of times. "At the decease, &c., this

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trust shall cease"; "at the decease, &c., I give." The word *and*, between *cease* and *give*, is used to supply the words "at the decease, &c.," and save a repetition of them. "And" always signifies an addition to what precedes. The testator says "At the decease of the last survivor, &c., this trust shall cease." But this is not all that shall then take place. The testator goes on to say "and" (that is, in addition to my putting an end to the trust,) "I give," &c. Hence, if we supply in words all that is understood by the word "then" and its equivalent, we shall have in the sentence expressing the gift the following: "At the decease, &c., this trust shall cease; at the decease, &c., I give all the estate, which at the decease, &c., shall be held in trust under this will, to my grandchildren who shall, at the decease, &c., be living.

And further, by the terms of the will manifestly the legal estate in the trustees did not pass, and could not have passed, to the grandchildren on the death of the testator. This is conceded. And it must further be conceded that on "the death of the last survivor," &c., it will, for the first time, pass to the grandchildren then living, by the words "I give, devise and bequeath." These are the only words in the will that make any disposition of the principal estate to the grandchildren. And here they carry the entire estate in fee simple to such of the grandchildren as shall then be living, and to the living issue of those who shall then be dead. Is it possible that these words had the effect to transfer the equitable interest in the principal estate to the grandchildren on the death of the testator, when here, forty or fifty years afterwards, the same estate is clearly and unmistakably transferred to them, together with the legal estate?

Again, the testator, in the fifth clause of the will, places himself at the death bed of the last survivor of his wife and children, and upon his or her death declares that all the object he had in view in trusteeing his property, in order that he might transmit to his descendants an enormous estate, has now been accomplished. He has no more need

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of trustees, and therefore he says "the trust shall cease, and I give, devise and bequeath all the estate" now held by the trustees, to my grandchildren now living, "and to their heirs forever." He at that time, in legal contemplation, uttered the words of gift.

Again, the article we are considering goes on to say—"but if any grandchild of mine shall have died, leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her or their parent would have been entitled to if living."

"Would have been entitled to if living" presupposes that his, her or their parent had never been entitled to *the share*, owing to his death before the time when the shares are given by the will. These words show clearly that the testator never supposed that he had given to his grandchildren a vested interest in his estate which would take effect at the time of his death. And, indeed, so to do might be ruinous to the scheme the testator had in view in trusteeing his property, which was, as we have seen, to transmit to his descendants a vast estate. A vested interest in the grandchildren could be alienated or attached for debt, and it might be that when the vast estate, with all its accumulations for many years, should be ready for distribution in the far future, strangers to the blood of the testator might come in and claim it. The testator had fourteen grandchildren living at the time of his death, the eldest of whom was but eleven years of age. During the forty or fifty years that the trusteeship in all probability would have to continue, their number would be doubled or trebled, while death in the meantime would remove some of them, and they would wait with great impatience for the time to arrive when they should come into possession of their estates; and many of them would become discouraged and sell their interests at any price for ready money, preferring to do so rather than wait till old age to get more, and in the mean time run their chances of dying and getting nothing. It would seem therefore that, to carry out the scheme of the testator to a successful termination, it

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was necessary to give to the grandchildren only a contingent interest, incapable of vesting. This the testator must have known, and in the making of his will acted with reference to it accordingly.

But it seems to me clear, from the language of the bequest, that the interests of the grandchildren in the principal estate of the testator are merely contingent. Their interests depend altogether upon the uncertain event of their being alive at the death of the last survivor. The gift is only to grandchildren *then* living. To be then living is essential to the right to receive any of the estate. It is a condition precedent. It distinguishes the grandchildren who will take from those who will not take. As well might a child of *A* claim a bequest made to a child of *B*, as for a grandchild to claim under this bequest who was not then living. If the testator had said—"At the death of the last survivor of my wife and children I give, devise and bequeath all my estate to my grandchildren," and had stopped there, then, inasmuch as the description would apply to all the grandchildren, and the event on the happening of which they were to take was certain to occur at some time, it might be said that the grandchildren took vested interests in the principal estate at the death of the testator. The distinction between a vested and contingent interest is this. If the event is certain to happen on which the interest is made to depend, and the taker is certain, the interest is vested. But if the event is uncertain ever to occur, or the person to take is uncertain, then in either case the interest is contingent. This distinction is clearly stated in *Alfred v. Marks*, 49 Conn., 473.

It seems to me that here lies the error in the opinion given by the majority of the court. They treat the case as though there was no uncertainty in the persons to take, whereas the will leaves it wholly uncertain who will take the estate at the death of the last survivor, &c.

The fifth clause of the will provides as follows with regard to the children of the grandchildren:—"If any grandchild of mine shall have died leaving a child or children

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surviving at the expiration of said trust, such child or children shall take the share that his, her or their parent would have been entitled to if living." Here the will gives the share that would have come to the deceased parent, had he been living at the death of the last survivor, &c., directly to the child or children of such parent. The child or children take as purchasers, as much so as though they were the child or children of strangers. The phrase, "such child or children shall take the share that his, her or their parent would have been entitled to if living," was used merely as descriptive of the interest they would take directly from the will as purchasers. They inherit nothing from their parent. He had nothing for them to inherit. This position does not admit of a question. Now, let us take the case of one grandchild, which will illustrate many cases that may occur. *A* was born not long after the death of the testator. He grows up, marries, and has a child *B*. *B* grows up, marries, and has a child *C*. Thus three generations come into being after the death of the testator and before the death of the last survivor, &c. They are all living. Who can tell to which of them the bequest will carry a portion of the principal estate, if eventually it will carry any to either of them? Manifestly it is all uncertain by the terms of the will whether either of them will take; much more which of them, if either. If *A* happens to be alive at the death of the last survivor, &c., he will take. If *A* is not then alive, but *B* is, *B* will take. If *A* and *B* are both dead, but *C* is then living, *C* will take. If all are then dead, none will take. It is the uncertainty of the taker that makes the interest in the grandchildren merely contingent;—contingent from the death of the testator to the death of the last survivor, &c., when it will become vested in parties unascertainable before the time arrives.

It seems to me that this view of the case is fully supported by the authorities in this state and elsewhere. In the case of *Alfred v. Marks*, 49 Conn., 473, a devise was made to *M.* in fee, coupled with a proviso that if he should die without children a portion of the property should go to

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the heirs of *W.* It was held that the heirs of *W.* took only a contingent interest. In the case of *Bristol v. Atwater*, 50 Conn., 404, an estate was left in trust for Mrs. Denman, remainder to her children in fee; but if she should leave no children, then the estate was given to the other children of the testator in equal shares or to their issue, the children of such as were deceased, whether of children or grandchildren, to take the share which their deceased parent would have had. It was held that the interest in the other children of the testator was contingent till the death of Mrs. Denman. This case seems decisive of the one in question.

In the case of *Wheeler v. Fellowes*, 52 Conn., 238, the testator gave his property to executors in trust for the payment of the income to his children during their lives, and when the youngest of the testator's grandchildren should arrive at the age of eighteen years the principal of the trust estate was to be divided in fee equally among the grandchildren, "and if any of them shall have deceased leaving children or other descendants, then such children or other descendants shall take the share that would have belonged to his or her deceased parent or ancestor, had he or she then been living." The court held that the interest in the grandchildren or other descendants was contingent till the youngest grandchild should arrive at eighteen years of age. This case is strikingly like the one under consideration.

In the case of *Brown v. Williams*, 5 R. I., 309, the devise was to trustees for the use of the testator's daughter *M.* for life, remainder to her issue, and if she died leaving no issue, then as follows:—"I give and devise the aforesaid described lands and premises to the children of my daughter *A.*, not only those who are now born but also those that may be born, to be equally divided between them, share and share alike, or to the issue of deceased children that shall be alive at the time of my daughter *M.*'s decease; the children of a deceased child to take the same share their parent, if living, would have taken, the which I do

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hereby give to them, their heirs and assigns forever." The court held that the interest of the children of *A.* and their issue was contingent till the death of *M.* This case is another strikingly like the one in question.

In the case of *Thomson v. Ludington*, 104 Mass., 193, a testator by will gave his estate to his widow during her life or widowhood, and at her decease or marriage to such of his children as should then be living, share and share alike, to them and their heirs forever. One of the daughters of the testator survived him, but died before the death or marriage of the widow, leaving a son born in the life time of the testator. The court held that the deceased daughter of the testator had only a contingent interest that could not be inherited by the son.

In the case of *Hall v. Hall*, 123 Mass., 120, a testator, whose daughter and her children survived him, by his will bequeathed a certain sum in trust to accumulate till his grandchildren respectively should attain the age of thirty-five years, when a proportionate part of the fund and accumulation, divided by the number of grandchildren then living, should be paid over to each of them. It was held by the court that under this bequest the grandchildren of the testator took only contingent interests, which could not vest till the grandchildren respectively arrived at the age of thirty-five years.

In the case of *Colby v. Duncan*, 139 Mass., 398, the testator, after making several bequests, gave the income of the remainder of his estate to his wife during her life; the will then proceeding as follows:—"And after the decease of my said wife I give, devise and bequeath all my estate, real, personal and mixed, to my children who may then be living, in equal shares; and in case either of them shall have died, leaving legal heirs, then such heirs shall be entitled to the share which their deceased father or mother would have been entitled to if living; to hold to them and their respective heirs and assigns forever." The court held that the interest of the children of the testator during the life of the wife was merely contingent. Judge ALLEN, in

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giving the opinion of the court, said:—"The devise is clearly limited to the children who may be living at the decease of the testator's wife, and until that event happens it cannot be ascertained who will take." This case, in all essential particulars, is like the one under consideration.

I think the interest the grandchildren have in the principal estate of the testator is merely contingent; and, if so, then it is clear that the disposition the testator attempted to make of it is void by the statute against perpetuities. This the majority of the court concede, and the question is too clear for discussion.

In this opinion LOOMIS, J., concurred.

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MC CARTHY AND OTHERS.

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63	106
53	290
66	447

Where a person stands in a relation of special confidence towards another and has with him some transaction from which he derives benefit, such transaction will not be sustained in equity unless it was fair in itself and its nature and effect fully understood.

And the burden of proof is on the person claiming the benefit of the transaction to show these facts.

Where a debtor understandingly and deliberately conveys away his property to hinder or defraud his creditors, a court of equity will not lend him its aid to recover it back.

But whether a party guilty of an independent fraud in receiving or retaining property upon such a conveyance should be allowed to avail himself of the fact that the conveyance to him was made to defraud creditors, as a defense against a suit to recover the property back: *Quære*. The court inclined to the opinion that such a qualification of the rule would be reasonable.

Where an old man, in feeble health, and in great agitation of mind over a suit threatened by his wife, with whom he had a controversy, and over her incurring debts in his name, and in fear that he was going to lose his property, conveyed away his property, but it was not found that he did so to evade the claims of his wife and creditors, it was held that his act was not to be regarded as done with such an intent to evade his debts that a court of equity ought to refuse its aid to recover the property back.

[Argued June 12th—decided August 28th, 1885.]

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SUIT for the annulling of a mortgage and of a later conveyance of real estate, and for a reconveyance of the same, for the annulling of a bill of sale for the payment of certain money, and for the possession of the real estate; brought to the Superior Court. The following facts were found by a committee:

Martin L. Blackman, named in the complaint, was, in November, 1881, about sixty-eight years of age. He had lived in Ansonia, in New Haven County, many years, and had successfully conducted a tin shop and hardware store at that place, and was at that time possessed of real estate in Ansonia valued at \$20,000, and real estate in Shelton valued at \$3,000, all of which was free from incumbrance. He also had deposits in the Ansonia Savings Bank, the Derby Savings Bank, the Connecticut Savings Bank and the New Haven Savings Bank, amounting in all to about \$6,100. He also had a stock of goods in his store and tin shop, household goods, horse, wagons, and chases in action, amounting in value to about \$7,000. He was substantially out of debt. He had accumulated all of this property in his business.

His first wife died in December, 1880, and on the 8th day of May, 1881, he was married to Lizzie M. Foy. He was childless, and had no relatives nearer than brothers and sisters, or the issue of deceased brothers and sisters. William McCarthy is a nephew of Blackman, and Mary Ann McCarthy is his wife, and not otherwise related to Blackman. The Owens named in the complaint are children of a cousin of Blackman.

Blackman and his second wife did not live happily together, and she, on the 3d of November, 1881, brought a complaint for divorce, claiming alimony, and attached his property for \$20,000. On the 4th of November Blackman wrote a letter to Hugh Dailey, the attorney bringing the complaint, proposing to make concessions for the purpose of settling the disagreement with his wife. On the 5th of November Blackman and his wife, and Dailey, as her attorney, met, when an agreement was made between Mr.

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and Mrs. Blackman that the suit for divorce should be withdrawn, that they should continue to live together, and that he should execute a note and mortgage for \$9,000 to Dailey, as trustee for Mrs. Blackman, payable at the death of Mr. Blackman, and should make certain other provisions for the support of the children of Mrs. Blackman by a former marriage.

Pursuant to this agreement Blackman on the 5th of November, 1881, executed and delivered to Dailey, as trustee, a note for \$9,000, and a mortgage to secure the note. At the time of making this agreement and note and mortgage, Blackman did not consult with counsel, nor with any person other than his wife and her attorney, Dailey.

Within two or three days after executing the agreement, note and mortgage, Blackman, claiming that his wife was abusing him, consulted counsel with reference to disposing of his property, setting aside the note and mortgage, and instituting proceedings for divorce from his wife. At these consultations either William McCarthy or his wife, Mary Ann McCarthy, was present at the request of Blackman. McCarthy and his wife had knowledge that Blackman and his wife were not living happily, and each rendered him such assistance as they could.

After taking such counsel Blackman, on the 9th day of November, 1881, executed and delivered to Mary Ann McCarthy a trust deed of all his real and personal estate, subject to certain conditions therein expressed.

The deed conveyed two pieces of real estate, one in Shelton and the other in Derby, in New Haven County, the latter containing two dwelling houses, a barn and other buildings. After describing the real estate the deed proceeded as follows:—

“I also hereby assign, sell, transfer, and set over to the said Mary Ann McCarthy, and deliver into her hands and possession, and subject to the same conditions and trusts and for the same considerations, all my household furniture and all my goods and chattels of every name and description situated in said dwelling houses, excepting my

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wearing apparel; also all my goods, chattels, horse, carriage, wagons, hay and all other goods and articles in and about said houses and barn and on said premises; also all the goods in and about my store and shop on said premises, including all my articles of merchandise, as well as all tools and implements therein. The following conditions are hereby made a part of the consideration of this instrument of conveyance:

"1st. The grantee herein shall pay to the grantor herein, during the full term of his natural life, the sum of eighty-seven dollars, on or before the last day of every month from and after the last day of this present month of November, 1881, and for the remainder of this present month the said Mary Ann McCarthy shall pay the sum of forty dollars.

"2d. The said stock of goods, household furniture, horse, carriage, and all other personal property hereby conveyed, shall at all times be kept good and full and be replaced by other articles and goods of like kind, quantity, quality and value, as far as the same may be worn out, sold or disposed of, as per inventory and value thereon now made.

"3d. The possession, use and benefit of all said personal property shall pass over from said Blackman, grantor, to said McCarthy, grantee, with the delivery of this instrument; but it is understood that the title thereto does not become absolute in the grantee until all the conditions of this instrument are fulfilled and carried out, which are to be carried out within the life time of the grantor; and that the payments of the sums of money herein specified and the trusts hereinafter named are charged upon all the property, real and personal, hereby conveyed, and are, in part, considerations of the same.

"4th. The grantor hereby reserves to himself the right to use one of the bed-rooms and a joint use of one of the parlors and sitting rooms in said house with the said grantee, but said reservation is confined and limited solely to the person of the grantor; which use is reserved during his natural life and whenever he may choose to personally occupy the same.

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"5th. At my decease all the property which I have hereby conveyed shall be inventoried and appraised, and also that personal property which may have been substituted, and after all expenses have been paid incident to the execution of this trust, the said Mary Ann McCarthy shall pay over to the then living children of my adopted daughter Elizabeth Owens, late deceased, a sum of money equal to one half of said appraised valuation; and said last named trust is hereby charged upon said lands as a trust for the benefit of said children; meaning and intending that each of said children should have the use of one half of said sum so ascertained as aforesaid; and that in case of the decease of any one of them, then the children, if any, of such decedent, shall have the same share that the parent, if living, would take under this trust.

"6th. Said Mary Ann McCarthy shall keep said buildings at all times painted and in as good repair and condition as they now are, and shall also keep the same as well as said goods well insured; which insurance and policies shall be assigned to the grantor as collateral security for the performance of the trusts and conditions herein named, and she shall also keep the taxes and assessments on said lands and property paid up."

This deed was made by Blackman to Mary Ann McCarthy rather than to her husband, by direction of Blackman, and for the reason, as stated by him, that she would take better care of the property. Neither William nor Mary Ann McCarthy solicited the deed, but it was made by Blackman voluntarily after consultation with his counsel.

William and Mary Ann McCarthy accepted the deed and immediately entered into possession of the property therein conveyed, moving into the house over the store which Blackman and his wife had occupied up to this time. They ordered Mrs. Blackman to leave, which she did on the following day, and Mr. Blackman lived with McCarthy and wife pursuant to the terms of the trust deed. At about the time of the execution of the trust deed Blackman trans-

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ferred the deposits in the savings banks to Mary Ann McCarthy, taking deposit books in her name, but retaining possession of the books.

About the middle of November, 1881, Michael Kenney, a lawyer from Michigan, was visiting a relative in Ansonia. He met Blackman at a social gathering, when the latter introduced the subject of his troubles with his wife, and of the trust deed made by him. Subsequently he consulted with Kenney relative to the same, and employed him to assist him in settling with his wife.

Kenney, pursuant to his employment, effected an agreement between Mrs. Blackman and her trustee, Dailey, and Mr. Blackman, to the effect that Blackman should pay his wife \$5,000, that she should surrender the \$9,000 note and mortgage, and should proceed to obtain a divorce from him, and that she should make no further claim for alimony or for any interest in his estate. Pursuant to this agreement Blackman placed in the hands of Kenney the savings bank books standing in the name of Mrs. McCarthy, on which there was due \$6,100, to draw the money from the banks, and to complete the settlement with his wife upon the terms agreed upon. Mrs. McCarthy went with Kenney to the several banks, drew the money due on the books, and gave it to Kenney, and he out of this money paid the \$5000 to Dailey as trustee for Mrs. Blackman, and Dailey, as such trustee and as attorney for Mrs. Blackman, quitclaimed to Mrs. McCarthy the mortgage of \$9,000, and gave up the note secured by it. The date of this quit-claim deed was November 18th, 1881. Mrs. Blackman did thereupon, on the same day, bring another complaint for divorce to the Superior Court for New Haven County, alleging for cause intolerable cruelty, which divorce was granted the petitioner by the court April 18th, 1882.

On the 17th of November, 1881, Blackman executed and delivered to Mrs. McCarthy a warranty deed of the same real estate described in the trust deed of November 9th. On the 19th of November, 1881, he executed and delivered to her a bill of sale of the goods and material in the store

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and tin shop, the horse, carriage and all choses in action arising out of sales of goods in the store.

At the time of the execution and delivery of the warranty deed and bill of sale there had been no release of the trust deed of November 9th, 1881, and no release of the mortgage of \$9,000, other than the assignment of the same to Mrs. McCarthy, nor has there since that time been any such release.

At the time of the execution of the trust deed of November 9th, 1881, William and Mary Ann McCarthy had no property, nor have they since acquired any property other than what has been conveyed to them by Blackman. They paid no consideration to Blackman for the property described in the trust deed, warranty deed and bill of sale, nor for the savings bank deposits that were transferred to Mrs. McCarthy, nor did they or either of them make any agreement to support Blackman as is specified in the warranty deed, nor to perform the conditions of the trust deed, except what might be implied by their acceptance of the deeds.

After William and Mary Ann McCarthy entered into possession of the property under the trust deed, they occupied the tenement over the store, and Blackman has lived with them from that time to this, and they have supported and cared for him in a suitable manner.

The business of the store and tin shop from the time of the giving of the trust deed down to the time this suit was commenced, was conducted in the usual manner by Blackman, except that the business was done by him as agent for Mary Ann McCarthy. The business of the store was for the most part managed by Blackman. William McCarthy worked in the tin shop and Mrs. McCarthy rendered some assistance in the store. The receipts from the store and tin shop and the rents from tenements on the property were paid to Blackman, and he, after paying the family expenses of the McCarthys and himself, and the expenses of the business, turned over the remainder to Mrs. McCarthy, and she, by advice of Blackman, deposited the same in her

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name in the Derby Savings Bank. The amount so deposited by her was \$1,500. She drew the same from the savings bank before the process in this suit was served on the bank, so that at the time of service of such process there was no deposit to her credit in the bank nor anything due her from the bank.

The \$87 a month specified in the trust deed of November 9th, to be paid to Blackman, was never paid to him, nor was the same ever demanded by him.

At the time of these transfers in November, 1881, Blackman was in a feeble physical condition, he was miserly and penurious, his wife had contracted debts in his name and without his knowledge, and after she had been driven from his house she was threatening suit for support. These things, together with the complaint for divorce and attachment for alimony, greatly excited him, and he was in great fear that he was going to lose his property. During all this time, however, he managed the business of his store and tin shop in his usual manner, and continued to so manage it down to the time of the bringing of this suit. From the foregoing facts I find that Blackman at that time had sufficient mental capacity to transact business, and that he understood the business that he was doing.

The trust deed of November 9th, the warranty deed of November 17th, the bill of sale of November 19th, the transfer of the savings bank deposits, the settlement with his wife and the agreement for divorce, were all made and done by Blackman voluntarily and without importunity from any one.

All the allegations of fraud and conspiracy between Mrs. Blackman, Michael Kenney, William McCarthy and Mrs. McCarthy, to procure from Blackman his property, I find not proved and therefore not true.

Blackman has no property other than such interest as he may have in the property hereinbefore described.

Upon the application of the selectmen of the town of Derby the court of probate for the district of Derby appointed the plaintiff conservator of Mr. Blackman, on the 6th day of August, 1883.

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The plaintiff filed a remonstrance against the acceptance of the report, which the court (*Andrews, J.*) overruled, accepted the report, and rendered judgment therein in favor of the defendants. The plaintiff appealed.

W. H. Williams and *E. B. Gager*, for the appellant.

1. The conveyance and bill of sale to Mary Ann McCarthy were invalid from want of sufficient mental capacity on the part of Blackman. It is found that he had mental capacity "to transact business" and that he "understood the business he was doing." If this was all it was not sufficient. *Hale v. Hills*, 8 Conn., 43; *Taylor v. Atwood*, 47 id., 498; *Hovey v. Chase*, 52 Maine, 304; *Dennett v. Dennett*, 44 N. Hamp., 531; *Young v. Stevens*, 48 id., 133; *Pomeroy's Eq. Jur.*, § 947 and note 1.

2. They were invalidated by fraud and undue influence. An unconscionable advantage was taken of him as a feeble old man under great excitement and fear. "It is no objection that the committee do not expressly find fraud, but only certain facts from which the law may infer fraud, or we should rather say, facts from which the law justly assumes a wrong to have been done, facts which show that the deed in question was obtained under circumstances which in *conscience* and *good faith* require it to be set aside." *Lavette v. Sage*, 29 Conn., 589. Fraud is "a legal conclusion to be derived or inferred by the court from established facts." *Story v. Norwich & Worcester R. R. Co.*, 24 Conn., 113. See also *Beers v. Botsford*, 13 Conn., 154; *Pettibone v. Stevens*, 15 id., 26; *Miller v. Welles*, 23 id., 32; *Taylor v. Atwood*, 47 id., 498.

3. A court of equity will set aside any conveyance made by a person in a position of weakness or dependence, to one who stands to him in a relation of confidence and trust, unless the transaction be perfectly fair and entered into by the former with a full understanding of the facts. This transaction was between trustee and *cestui que trust*, and it was the duty of Mrs. McCarthy and her husband, standing in a "position of superiority" over the feeble old man, to

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see to it that no inequitable or unconscionable advantage was taken of him, much more not to take or retain such advantage themselves. And the burden of proof rests on them to show that the transaction was a fair one and perfectly understood by Mr. Blackman. 2 Pomeroy Eq. Jur., §§ 955 to 958, and notes; *Gillespie v. Holland*, 40 Ark., 28. The law assumes in such a case that the parties were unequal and will not tolerate any advantage taken of the opportunity. *Hatch v. Hatch*, 9 Ves., 295; *Huguenin v. Baseley*, 14 id., 273; *Cooke v. Lamotte*, 15 Beav., 234; *Clark v. Malpas*, 31 id., 80; *Hamilton v. Wright*, 9 Clark & Fin., 111; *Williams v. Stevens*, 30 Jur., 952; *Aberdeen Railway Co. v. Blaikie*, 1 Macqueen's H. L. Cas., 461; *Tate v. Williamson*, L. R., 2 Cha. App., 61; 3 Lead. Cas. in Eq. (H. & W. notes) 112, 120; *Hemingway v. Coleman*, 49 Conn., 392; *Nesbit v. Lockman*, 34 N. York, 169; *Cowee v. Cornell*, 75 id., 100; *Whelan v. Whelan*, 3 Cowen, 537; *Brice v. Brice*, 5 Barb., 533; *Tracey v. Sacket*, 1 Ohio St., 58; *Emery v. Parrott*, 107 Mass., 100; *Shipman v. Furness*, 69 Ala., 555; 1 Story Eq. Jur., §§ 321, 322 and notes. If Mrs. McCarthy received these transfers innocently, but infected with the fraud of either Mrs. Blackman or Kenney, the obligation of restitution follows it into her hands; and she cannot avail herself of her own innocence to protect the property against the party who has been deprived of it by fraud or imposition. *Whelan v. Whelan*, 3 Cowen, 573; *Brice v. Brice*, 3 Barb., 533; *Gardner v. Mangam*, 98 N. York, 643; *Krumm v. Beach*, 96 id., 404.

4. The conveyances were not made to defraud or hinder creditors. It is not found that they were so made, and the facts found do not warrant that conclusion. And if they were so made these defendants would not be allowed to avail themselves of that fact to sustain themselves in fraudulently keeping the property.

W. C. Case and *T. J. Fox*, for the appellees.

1. In the absence of mental incapacity on the part of the grantor or fraud on the part of the grantee, the convey-

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ances in question will not be set aside. "A voluntary deed, free from any imputation of fraud, surprise or undue influence, spontaneously executed by a person with his eyes open, cannot be set aside in a court of equity." 2 Swift Dig., 70. "A voluntary settlement, completely executed without any circumstances tending to show mental incapacity, mistake, fraud or undue influence, is binding, and will be enforced against the settlor and his representatives, and cannot be revoked except so far as a power of revocation has been reserved in the deed of settlement." *Falk v. Turner*, 101 Mass., 494; *Viney v. Abbott*, 109 id., 802.

2. Blackman was not mentally incapacitated. He had always managed his own business and so managed it as to accumulate the property which occasions this controversy. He continued to control it in the usual manner, after the first deed had been given, down to the date of this suit. It is expressly found that he had, at the time of executing these conveyances, "sufficient mental capacity to transact business and understand the business he was doing." "Old age is not a sufficient ground to presume imposition so as to justify setting aside a contract." 2 Swift Dig., 75. Nor physical weakness. *McKinney v. Hensley*, 74 Misso., 326. The finding that he was of "sufficient mental capacity, and understood the business," is conclusive as to this reason.

3. He was under no undue influence. "Neither William nor Mary Ann McCarthy solicited this deed, but the same was made by Blackman voluntarily, after consultation with his counsel." "The trust deed of November 9th, the warranty deed of November 17th, the bill of sale of November 19th, the transfer of the savings bank deposits, the settlement with his wife, and the agreement for divorce, were all made and done by Blackman voluntarily and without importunity from any one." The McCarthys were not volunteers. They were called upon by Blackman to assist him, and all they or either of them ever did was at the express request of Blackman. So far from influencing him, they never even advised him.

4. These conveyances were not procured by fraud and

conspiracy. The facts found sufficiently show this, but to put the matter beyond all question, the committee expressly finds that "all allegations of fraud and conspiracy to procure from Blackman his property, I find not proved, and therefore not true."

5. The transactions on their face do not commend Blackman to a court of equity as a meritorious sufferer entitled to relief from the consequence of his own acts. The nature of the acts and contracts does not justify the conclusion that Blackman did not exercise his deliberate judgment, and that he was imposed upon or overcome by cunning, artifice, or undue influence. *Taylor v. Atwood*, 47 Conn., 498. That an old man, fearing upon good grounds that he will lose his property, should convey it away to the natural objects of his bounty—those who would inherit it at his death—stipulating for his own support during the remaining years of his life, (and this is the plaintiff's whole case as disclosed by the report,) is not upon its face an inequitable, unconscionable transaction calling for equitable relief. The court will not interfere for inadequacy of price, (an element which we do not admit exists here.) "Such persons," (that is, persons capable of contracting), "may sell their property for less than its value, or give it away. And the law must either regard such contracts as having been made knowingly and purposely, and therefore not to be escaped from as thus intentionally made, or assume the right to modify every contract; which would be intolerable." *Hemingway v. Coleman*, 49 Conn., 393.

6. The only other reason for invoking the aid of a court of equity against these conveyances is the claim that the McCarthys have failed to perform the conditions. But here again the report of the committee is explicit and conclusive. Blackman has not only received his support from the McCarthys, but has retained control of the property, and remained practically its owner. A court of equity will not lend its aid to enforce a forfeiture of a deed for non-performance of its conditions. *Beecher v. Beecher*, 43 Conn., 561. But, it is said, he has not received the \$87 per

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month, stipulated for by the first trust deed, and that he ought to have judgment therefor. But as a matter of fact he has received from Mrs. McCarthy far more than the sum claimed—having received the entire proceeds of the real estate, of the tin business, and of the labor and services of the McCarthys, in the shop, store and house.

7. The conveyances were prompted by a desire to save the property from the attacks of creditors, either real or imaginary, and valid therefore between the parties. *Chapin v. Pease*, 10 Conn., 72; *Freelove v. Cole*, 41 Barb., 318; *Dunaway v. Robertson*, 95 Ill., 425; *Smith v. Hubbs*, 10 Maine, 71; *Etter v. Anderson*, 84 Ind., 337; *York v. Merritt*, 80 N. Car., 290; *Ford's Exrs. v. Lewis*, 10 B. Monr., 127. "It is a settled principle of law that the grantor in a deed made for the purpose of defrauding, hindering or delaying his creditors cannot be relieved against its operation. As to him it is valid." *Ybarra v. Lorenzana*, 53 Cal., 199.

STODDARD, J. At the time of the transfers in question in November, 1881, the grantor and donor, Martin L. Blackman, was about sixty-eight years of age, and during his life had accumulated in a small tin shop and hardware business property valued at about \$36,000, of which \$20,000 was in real estate, and \$3,000 deposited in savings banks, the remainder being his stock in trade and appliances for carrying on his business. He was childless. His first wife had died in December, 1880, and on the 8th of May, 1881, he married again, and on the 3d of November, in the same year, his wife instituted proceedings for a divorce, claiming alimony, and attached his property for \$20,000. He made an arrangement with his wife's attorney by which he gave to the attorney, as trustee for his wife, a note for \$9,000, secured by mortgage upon his real estate, and payable at his death. He was at this time, it is found, "in a feeble physical condition; he was miserly and penurious; his wife had contracted debts in his name, and without his knowledge," and was threatening suit for support. "These things, together with the complaint for divorce and attach-

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ment for alimony, greatly excited him, and he was in great fear that he was going to lose his property."

William McCarthy is a nephew of Blackman, and Mary Ann McCarthy is the wife of William. Said William, and especially Mary Ann, appear to have largely enjoyed the confidence of Blackman, and, excepting his counsel, they are the only persons with whom he consulted.

Blackman claiming that his arrangement with his wife had failed in its purpose, at his request William and Mary Ann went with him to consult counsel with reference "to disposing of his property, setting aside said note and mortgage of \$9,000, and instituting proceedings for a divorce from his wife," and William and Mary Ann "each rendered him such assistance as they could," and appear to have been fully advised as to his wishes and purposes.

As the result of such conferences with counsel on the 9th day of November, 1881, Blackman executed and delivered to Mary Ann a trust deed of all his real and personal estate. This deed was accepted by William and Mary Ann McCarthy, and by the terms of the deed Mary Ann became a trustee, and Blackman a beneficiary of the trust. The deed is expressed to be in consideration "of the conditions and trusts hereinafter recited." It is drawn with deliberate care, with full appreciation of the circumstances and conditions relating to the present and future life of the grantor, the amount and situation of his property, and the persons whom he desired to make objects of his bounty. The conditions of the deed provide for a monthly payment by the grantee to the grantor of the sum of \$87, that the amount and condition of the personal property conveyed shall be kept good by the grantee, and that the title to the personal property should not become absolute in the grantee until all the conditions of the deed were complied with. The money payments and trusts named in the deed are charged upon all the property conveyed.

The grantor reserved to his own personal life use some portion of the real estate, and by the fifth clause he provides that at his death one half of the appraised value of

his estate shall be paid over to the then living children of his adopted daughter, and then he charges this last named trust upon the lands.

By the sixth clause he provides that the grantee shall keep the buildings at all times painted and in as good repair and condition as they now are, that she shall keep them insured, and that the insurance shall be assigned to the grantor as collateral security for the performance of the trusts and conditions therein named, and that she shall also keep the taxes and assessments on the lands and property paid up. And then, at the conclusion of the deed, super-added to all these repeated attempts to charge and bind the property to the performance of these trusts and conditions, the grantor further provided as follows:—

“But to this deed there is this additional condition, viz.:—If the grantee shall fail and neglect to fulfill any of the conditions of this deed specified above to be performed in the life time of the grantor, and he should decide to avail himself of such breach by giving notice thereof to the grantee, then this deed shall become void; otherwise, to remain in full force forever.”

Under the facts stated in the finding of the committee and the provisions of this deed Mary Ann McCarthy was a trustee and Blackman a *cestui que trust* of the rights and interests reserved to and provided for Blackman in and by the deed. She and her husband, by their own volition, occupied confidential relations as to the disposition of his whole property, and were giving him, and he receiving from them, aid and advice respecting the same, and from their personal and family relations a state of personal confidence existed.

This being the state of affairs on the 9th of November, 1881, on the 17th day of the same month Blackman executed and delivered to Mary Ann a warranty deed of all his real estate, and on the 19th he executed and delivered to her a bill of sale of all his personal property. These conveyances were without consideration and are claimed as gifts.

Before commenting upon the peculiar features of these last conveyances it will be well to refer to some of the doctrines that govern cases wherein voluntary dispositions of property have been claimed by the trustee against the beneficiary in the trust, and the rules that guide and control courts of equity as to gifts by persons in confidential, advisory and fiduciary relations.

In the tenth edition of Story's Equity Jurisprudence, vol. 1, § 307, this language is held:—"Let us, in the next place, pass to the consideration of the second head of constructive frauds; namely, of those which arise from some peculiar confidential or fiduciary relation between the parties. In this class of cases there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto stands, independent of any such ingredient, upon a motive of general public policy, and it is designed, in some degree, as a protection to the parties against the effects of overweening confidence and self-delusion and the infirmities of hasty and precipitate judgment." And after commenting upon the relation of parent and child, attorney and client, guardian and ward, the author proceeds in section 321 as follows:—"In the next place, with regard to the relation of trustee and *cestui que trust* or rather beneficiary. In this class of cases the same principles govern as in cases of guardian and ward, with at least as much enlarged liberality of application and upon grounds quite as comprehensive. Indeed, the cases are usually treated as if they were identical. A trustee is never permitted to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid if it were a case of guardianship." And in section 319 the author quotes approvingly the language of Lord ELDON. "There may not be (says he) a more moral act, one that would do more credit to a young man beginning the world or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking the matter into his

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fair, serious and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, unless quite satisfied that the act is of that nature, for the reason often given; and recollecting that, in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a court of justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression; and the difficulty of getting property out of the hands of the guardian or trustee thus increased. And, therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud, where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee."

And in section 311 it is stated that the incapacity of a trustee to purchase of his beneficiary is so absolute that the *cestui que trust* may set aside the transaction at his own option.

In the second volume of Pomeroy's Equity Jurisprudence, section 955, it is said:—"The single circumstance now to be considered is the existence of some fiduciary relation, some relation of confidence subsisting between two parties. No mental weakness, old age, ignorance, pecuniary distress, and the like, is assumed as an element of the transaction." And in section 957:—"There are two classes of cases to be considered which are somewhat different in their external forms, and are governed by different special rules, and which still depend upon the single general principle. The first class includes all those instances in which the two parties consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealings some conveyance, or contract, or gift. To such cases the principle literally and directly applies. The transaction is not necessarily voidable, it may be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by

clear evidence of good faith, of full knowledge, and of independent consent and action. * * * The transactions belonging to the first class may be gifts, or agreements and conveyances upon valuable consideration. The principle is applied with great emphasis and rigor to gifts, whether they are simple bounties or purport to be the effects of liberality based upon antecedent favors and obligations." And applying the general dictum to the particular case of trustee and beneficiary in section 958:—"In the second place, where the trustee deals, with respect to the trust, directly with his beneficiary. A purchase by a trustee from his *cestui que trust*, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable, and will be set aside on behalf of the beneficiary; it is at least *prima facie* voidable upon the mere facts thus stated. There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show, by unimpeachable and convincing evidence, that the beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property, and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might with reasonable diligence have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person competent to give such advice, then the transaction will be sustained by a court of equity. The doctrine is enforced with the utmost stringency when the transaction is in the nature of a bounty conferred upon the trustee, a gift or benefit without full consideration. Such a transaction will

not be sustained unless the trust relation was for the time being completely suspended, and the beneficiary acted throughout upon independent advice and upon the fullest information and knowledge."

In Perry on Trusts, vol. 1, § 168, the general rule is stated thus:—"Constructive trusts may be divided into three classes, to be determined according to the circumstances under which they arise. First, trusts that arise from actual fraud practised by one man upon another. Second, trusts that arise from constructive fraud. In this second class the conduct may not be actually tainted with moral fraud or evil intention, but it may be contrary to some rule established by public policy for the protection of society. Thus, a purchase made by a guardian of his ward, or by a trustee of his *cestui que trust*, or by an attorney of his client, may be in good faith, and as beneficial to all parties as any other transaction in life; and yet the inconvenience and danger of allowing contracts to be entered into by parties holding such relations to each other are so great that courts of equity construe such contracts *primâ facie* to be fraudulent, and they construe a trust to arise from them."

In section 194:—"At law, fraud must be proved; but in equity there are certain rules prohibiting parties, bearing certain relations to each other, from contracting between themselves; and if parties bearing such relations enter into contracts with each other, courts of equity presume them to be fraudulent, and convert the fraudulent party into a trustee. And herein courts of equity go further than courts of law, and presume fraud in cases where a court of law would require it to be proved; that is, if parties within the prohibited relations or conditions contract between themselves, courts of equity will avoid the contract altogether without proof, or they will throw upon the party standing in this position of trust, confidence and influence, the burden of proving the entire fairness of the transaction. Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his *cestui que trust*, an attorney of his

client, or an agent of his principal, equity will either avoid the contract altogether without proof, or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is, that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, *cestui que trust*, or other person holding a similar relation."

In section 195:—"These principles are applied in their full vigor to all contracts and sales between trustee and *cestui que trust*. The trustee is in such a position of confidence and influence over the *cestui que trust* that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust*, unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust*. The general rule is, that the trustee shall not take beneficially by gift or purchase from the *cestui que trust*, even although the supposed trustee and purchaser is a mere intermeddler and not a regularly recognized trustee." In section 197 the author declares that "it is thus seen that the rule against purchasing by trustees amounts almost to prohibition."

The decided cases support these doctrines of equity stated by text writers to the fullest extent, and in all cases where a contract or gift is claimed adversely to the beneficiary in the trust relation, as *cestui que trust*, client, ward, &c., courts of equity not only require of the trustee, attorney, guardian, &c., the most ample and convincing proofs of the entire fairness of the transaction, and possession of full information, knowledge and intentional action on the part of the beneficiary, after competent and independent advice and deliberate consideration, but courts also set

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aside such contracts and gifts with great freedom, either as void from their intrinsic nature, or voidable because of the absence of the required proofs of full consideration, deliberate action, independent, intelligent and competent advice, rational design, &c. The action, gift, contract, &c., must not only be intentional and with knowledge enough on the part of the beneficiary to care for his ordinary affairs, but such intentional act and knowledge must be characterized by these other elements in its composition.

This presumption of inequality in dealing, and the casting of this burden of proof upon the *cestui que trust*, guardian, attorney, &c., arises from the trust relation itself. *Cowee v. Cornell et al.*, 75 N. York, 100. In *Curran v. Belmontly*, 8 H. L. Cas., 742, a contract was set aside because it was "improvident, and hastily carried into execution." And see remarks of Lord Justice TURNER in *Baker v. Monk*, 4 De Gex, Jones & Smith, 392. In *Morgan v. Minett*, L. R., 6 Ch. Div., 648, a gift by client to solicitor was set aside, and BACON, V. C., said that the rule absolutely prohibited such gifts. This may be a somewhat stronger statement of the rule than prevails in other jurisdictions. But the settled doctrines of equity make it almost impossible that such a gift can prevail.

The case of *Savey v. King*, 5 H. L. Cas., 655, (CRANWORTH, L. C.), was of a gift by a son after arriving at full age to his father. The father was required "to justify what has been done; to show, at all events, that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it."

In *Rhodes v. Bate*, 1 Ch. App. Cases, 257, the language of the court is:—"I take it to be a well-established principle of this court that persons standing in a confidential relation towards others, cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that

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the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled 'general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are but of little if any importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence."

The case of *Archer v. Hudson*, 7 Beavan, 560, was of a gift by a niece, who had just come of age, to her uncle, who was regarded as standing *in loco parentis*. It is there said that the court "will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent of any sort of control." See also *Maitland v. Backhouse*, 16 Sim., 58.

The case of *Anderson v. Elsworth*, 3 Giff., 154, illustrates the extent and rigor of application of the doctrine in England. A voluntary deed made by a woman "of about seventy years of age and not incompetent, was set aside after her death for the reason that the deed was improvident, and because it did not appear affirmatively that she understood the whole nature and effect of the deed. This decree was made after the death of the grantor and in favor of volunteers, and although the court found 'that Elizabeth Marston (the grantor) certainly had a distinct intention to give her property to Mary Elsworth, who takes it by this deed to the exclusion of all other persons.'"

In all these classes of cases when such contracts and gifts are set aside, it is assumed that the intent to make them exists. But the question is not "whether she knew what she was doing, had done, or proposed to do, but how the intention was produced." Lord ELDON in *Huguenin v.*

Boseley, 14 Ves., 300. *Primâ facie* a purchase by a trustee from his *cestui que trust* cannot stand. *Spencer's Appeal*, 80 Penn. St., 332; *Smith, Exr. v. Townshend*, 27 Md., 368. In cases of contract between attorney and client it is said in *Dunn v. Record*, 63 Maine, 19, adopting the language of Judge STORY:—"The burden is upon the purchaser and not upon the client to establish the perfect fairness, adequacy, and equity of the transaction." The transaction must be fair and equitable, and the client must be fully informed of the nature and effect of the contract, sale, gift, &c. *Kisling v. Shaw*, 33 Cal., 440.

The books are full of cases holding substantially the same language.

Can the deed of November 17th and the bill of sale of the 19th be vindicated, tested by these rules?

These conveyances, regarded as they evidently were as one transaction, were a voluntary conveyance of all the grantor's property to another. It is said in *Anderson v. Elsworth*, 3 Giff., 169:—"Nothing could be more improvident than for a woman at her time of life to dispose of the whole of her property so as to leave for herself nothing. No doubt the gift was to a person with whom she was living and who was kind to her."

Did the grantor and donor "fully understand the nature and effect of the transaction?" He had but eight days before made an entirely different disposition of his property, for the purpose of arranging with his wife, and not as a gift, whereby his property was secured for his own use, and for the ultimate benefit of the children of his adopted daughter, by which his interests were fully protected by a large number of carefully drawn provisions, having the interests of himself and those children in view, charging all his property with these trusts and conditions; and notwithstanding all the controlling inferences to be drawn therefrom, it is said that he within these eight days voluntarily released all of these safeguards, gave away his power to provide for himself in his old age so carefully provided for in the first deed, relinquished all idea of providing for the

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natural objects of his bounty, the children of his adopted daughter, who occupied so prominent a part of his well considered scheme embraced in the first deed, and in addition made this voluntary conveyance to the same person whom he had but just before controlled by so many prudently devised stipulations and conditions.

Moreover, it is found that the grantee and her husband have no other property except this so conveyed to them. Intrinsically viewed, could anything be more irrational than to say that the grantor did this thing with full knowledge and with a settled intent?

There is absolutely nothing in the case to indicate any real change of mind on the part of the grantor as to the disposition of his estate. Is it to be believed that this miserly and penurious old man would, under any circumstances, voluntarily and intentionally give away all his property, and especially that he did so on November 17th after so distinctly declaring his contrary intent by the deed of November 9th?

But it is said that the committee find that these conveyances were voluntarily made, and without importunity from any one; that Blackman had sufficient mental capacity to transact business, and that he understood the business he was doing.

As a matter of course the gift was voluntary; that is the assumption in all cases of this character. But was it fair, equitable, made upon competent and adequate advice, and looking at all the facts and circumstances? Did these conveyances embody his real intent?

He was feeble in body, and greatly excited for fear of losing his property because of threatened litigation. Has this trustee, this donee of trust property, shown to the satisfaction of a court of equity that this gift was not the result of his feebleness and of the condition of his mind greatly excited over the contemplated loss of his property? Why this great excitement at the prospective loss of his property if all he desired was to rid himself of its burden?

Additionally, the conduct of all these parties for a long

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time after these conveyances indicates clearly that the real intent of this transfer was not a gift, for it is found that "the receipts from the store and tin shop, and the rents from tenements on said property, were paid to Blackman, and the business of said store and tin shop down to the time of this action were conducted by Blackman." In a word, all the parties have at all times treated this property as if these conveyances were inoperative, and as if Blackman was the real owner. This is wholly at war with the theory that it was a fair, free gift, made upon full knowledge and information.

Mary Ann McCarthy, the donee, took part in the transactions that resulted in this so-called gift. She was a party to them, and assisted in the consummation of some of the details of the transaction after the first deed. She was in the full confidence of Blackman, the trust relation continued both as a presumption of law and as a matter of fact, and now this donee of a trust estate says she can hold the trust property because she did not advise the gift, but that it was made through the advice and influence of one Michael Kenney, "a Michigan lawyer." There is no such finding in the case, and it is only by inference that this is claimed. But courts of equity will not resort to inferences to find facts not expressly found to sustain gifts of this kind. The burden of proof is on the donee to prove clearly and satisfactorily all things essential to sustain the gift.

Plainly the advice of Kenney to Blackman, if such advice was acted upon, was wholly incompetent and inadequate, unless there are other reasons than those appearing in the case; and if there are other facts and reasons tending to sustain this gift the donee must prove them.

Even if it should be admitted that the dealings of Kenney with Blackman constituted the independent advice so strongly insisted upon in the books, and even if that advice had been competent and adequate, she fails to fill the measure of proof requisite as to the fairness and equity of the gift; and certainly the evidence as to a real intent to deliberately and freely give is weak, doubtful and unsatisfactory.

If it should be admitted that on the 17th of November Blackman intended to give, absolutely and freely, this property to Mary Ann McCarthy, the fact that he had so radically changed his mind since he executed the deed of the 9th not only in respect to his personal interests and future life, but with reference to the other objects of his bounty, would, when taken in connection with his miserly and penurious disposition, and the state of great excitement that he was in, indicate strongly that he was incapable of appreciating the actual condition of himself and his property, and the relations of himself to that property and to those whom he so shortly before intended should be joint beneficiaries with her; and under either hypothesis the gift cannot prevail.

The finding of the committee that he had sufficient mental capacity to transact business, and that he understood the business he was doing, is not conclusive upon the question of intent, and is too brief, narrow and inconclusive; for this language is used in connection with references to his ordinary business; and even if he did know that he was executing a warranty deed and bill of sale, there is no evidence that he fully realized the whole scope and effect of his acts.

It is claimed on the part of the defendants that the conveyances made by Blackman were made to evade a threatened attachment of his property in a suit to be brought by his wife for her support, and that, even though the case be one where in other circumstances a court of equity would set aside the conveyances, yet it will not lend its aid to a party to recover property conveyed away for such a purpose.

It is a well settled rule that where a debtor understandingly and deliberately conveys away his property to defraud or hinder his creditors, a court of equity will not lend him its aid to recover the property back. But this is a defense which it is certainly very inequitable for these defendants to make, standing as they do in a confidential relation to the grantor. It is not perhaps an established qualification of the rule mentioned, that a person who, in retaining property conveyed to him, is himself guilty of a fraud, cannot

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avail himself of the prior fraud of the grantor for the purpose of keeping the property, but such a qualification of the rule is at least implied in *Railroad Company v. Durant*, 95 U. S. Reps., 579, and *Byington v. Moore*, 62 Iowa, 470. Such a qualification seems a reasonable one. However this may be, we think the case does not come within the application of the general rule for another and perhaps more decisive reason. In the first place, it is not found that Blackman made the conveyances to avoid the threatened suit. It is only found that "his wife had contracted debts in his name without his knowledge and was threatening suit for support;" and that "these things, together with the complaint for divorce and attachment for alimony, greatly excited him, and he was in great fear that he was going to lose his property." This is hardly equivalent to a finding that he made the conveyances to evade the claims of his wife or of his creditors. In the next place he was in a state of great excitement. The facts detailed show the agitated condition of his mind. The divorce suit and attachment for alimony was a matter gone by and settled, but which yet contributed to the disturbance of his mind. It had previously been found that he was in feeble health, and an old man. In these circumstances, what he did in his excited state of mind, in really a panic, ought hardly to be regarded as done with a deliberate intent. It was the hasty and inconsiderate work of a mind somewhat broken at the best, easily agitated, and, by the agitation, thrown off its balance. We think that, in the circumstances, the conveyances should not be treated as conveyances in fraud of creditors, and that the court should not make it a ground for refusing its aid to recover the property back.

In conclusion, we think it apparent that this gift of a *cestui que trust* to the trustee was improvident and irrational, hastily made, not upon due consideration, nor with competent, independent advice, wanting the elements of fairness and equity, that the presence of a real intent to give freely and deliberately is not proved, or that he was mentally unable to make a valid gift to his trustee.

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The plaintiff remonstrated against the acceptance of the report of the committee because "it was in evidence and not contradicted that Kenney, a Michigan lawyer, advised Blackman that the trust deed was good for nothing, * * * and that the subsequent conveyances, to wit, the deed of gift and the bill of sale, were executed under the advice of Kenney, and that Blackman was made to believe, and did believe, that these conveyances were necessary to enable his counsel to obtain proper relief from the threatened acts, &c; but the committee made no finding upon the subject." To this statement in the remonstrance the defendants demurred, thereby not denying the accuracy of the statement.

Assuming, then, that the committee did refuse to so find, it must have been on the theory that it was not important; and it is upon this theory that the court below went in overruling the remonstrance. If that advice, as claimed, was given, and Blackman did, in fact, make these last conveyances, not for the purpose of making a gift to Mary Ann McCarthy, but, being so advised, in order to obtain relief from threatened litigation, then that fact is conclusive against the validity of this gift; for, as has been said so often, unless the gift is really and freely made, with the real, deliberate intent to give, the transaction cannot be sustained. The committee should have found one way or the other on this subject, if there was evidence in the case pertinent thereto and a finding was claimed, and this is alleged in the remonstrance, and, for the purposes of this case, admitted.

The court erred in overruling this part of the remonstrance; but it is understood upon the argument of this case that the plaintiff now only seeks to set aside the deed of November 17th and bill of sale of November 19th; and as we are of opinion that, upon the facts found and stated in the committee's report, those conveyances must be set aside, the judgment of the Superior Court is reversed.

In this opinion the other judges concurred.

SUPREME COURT OF ERRORS,
HELD AT HARTFORD, FOR THE COUNTIES OF
HARTFORD, WINDHAM, LITCHFIELD,
MIDDLESEX AND TOLLAND,
ON THE FIRST TUESDAY OF OCTOBER, 1885.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

THE SHALER & HALL QUARRY COMPANY *vs.* CALVIN C.
CAMPBELL AND ANOTHER.

Under the rule of court, that where a case, referred to an auditor or committee, runs from term to term by continuance, such auditor or committee "will be re-appointed without a formal motion by either party, and the clerk may make the necessary entries therefor without any special order of the court," the omission of the clerk to make the entry on his docket does not affect the case. The re-appointment is made by the law, and the clerk's omission is only a clerical one, that can be corrected at any time afterwards.

But a re-appointment is not necessary. The case stands referred to such auditor or committee until the appointment is directly or impliedly revoked by the court.

Questions of adjournment, before auditors and committees, are, as in courts, a matter of discretion; and in the absence of conduct that indicates corruption or fraud, or a prejudice or unfairness that are equivalent to fraud, their action in the matter is final and cannot be reviewed.

[Argued October 6th—decided October 23d, 1885.]

ASSUMPSIT, upon the common counts; brought to the Superior Court in Middlesex County. The case was referred to a committee, who heard it and made his report, finding the issue for the plaintiffs. The defendants remonstrated against the acceptance of the report. The court (*Phelps, J.*) over-

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ruled the remonstrance, accepted the report, and rendered judgment for the plaintiffs. The defendants appealed to this court. The case is sufficiently stated in the opinion.

A. B. Crafts, for the appellants.

S. L. Warner, for the appellees.

GRANGER, J.—This case is an action of assumpsit, with the common counts, brought under the old practice. It was brought to the Superior Court in 1872, was continued from term to term until 1878, when it was referred to C. C. R. Vinal, Esq., as a committee, who heard the case in February, 1885, and made his report to the court then in session. The defendants remonstrated against the acceptance of the report, but the court overruled the remonstrance, accepted the report, and rendered judgment for the plaintiffs. The defendants appealed to this court.

The reasons of appeal are substantially those set up in the remonstrance, and though put in a variety of forms, may be stated briefly as follows:—

1. That the committee had no authority to act.
2. That the committee erred in refusing the defendants' request for an adjournment.
3. That the committee erred in receiving evidence.

As to the first point. The finding is that the committee, after the first appointment in 1878, which it is admitted was in all respects a legal one, "was not subsequently re-appointed, and no entry was made on the written docket of the court after that term showing that he had been re-appointed, but his name was regularly entered as committee in the printed term dockets of each succeeding term."

The printed term docket of which every lawyer practicing in that court had a copy, gave notice to all parties interested of the fact that Mr. Vinal was a committee in the case and was all the information needed by either party to enable him to take measures for having the case heard by the committee. But without relying on this docket as

taking the place in law of the regular permanent docket, or as giving validity to the continued tenure of the committee-ship by Mr. Vinal, it is sufficient that he had been in the first instance legally appointed, and that he had not been removed by the court or superseded by any other appointee, or the case disposed of in any other way. Where an auditor or committee is once legally appointed, and the case runs from term to term by continuance, the auditor or committee remains such and the case continues to stand referred until the appointment is directly or impliedly revoked by the court. An actual re-appointment at every term of the court is not necessary. The failure of both parties to bring the matter to the attention of the court is an acquiescence on the part of both in the continuance of the auditorship or committee-ship. A rule of court was adopted in 1879 that in a suit referred to an auditor or committee "such auditor or committee will be re-appointed without a formal motion by either party and the clerk may make the necessary entries therefor without any special order of the court." There had been a rule substantially like this adopted in 1859, and for many years before this had been the general practice in the courts of the state.

It is claimed on the part of the defendants that this rule implies that unless the clerk makes the entry of re-appointment in his docket there is no proof of re-appointment and consequently no re-appointment, the rule authorizing the clerk to enter such re-appointment on his docket without action on the part of the court, but not dispensing with such entry by the clerk. But the case is one of a re-appointment made by the law, and simply of a failure of the clerk to enter up the re-appointment. But such a clerical omission can always be corrected, and the clerk would have the right to-day to supply the needed record. There is nothing in this reason of appeal.

As to the second reason. It is a well settled rule that all questions of adjournment, or of the continuance of a case, where there is no provision of statute determining the matter, are questions for the discretion of the court and

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can not be made the subjects of error. And the same rule applies to auditors and committees. And it does not affect the case that the question in the particular case is one of grave importance to the party asking for an adjournment or delay, and that he seems to have been harshly treated in refusing it. In the absence of conduct on the part of the triers that indicates corruption or fraud, or a prejudice or unfairness that are equivalent to fraud, their action in the matter is final and can not be reviewed.

As to the third reason. It appears that the claim of the plaintiffs did not depend on the accuracy of the entries on their account book, regarded as original entries. They presented their claim in a bill of particulars, and the witness was asked whether that was a correct statement and whether the goods therein mentioned were actually delivered. There can be no objection to this evidence.

In regard to the evidence claimed by the defendants, that a receipt was given for payment made for some of the articles mentioned in the bill of particulars, the court finds expressly that it did not appear that the receipt was for the same articles.

There is no error.

In this opinion the other judges concurred.

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THE TOWN OF VERNON vs. THE TOWN OF ELLINGTON.

D, an alien, came to the defendant town to reside and was there naturalized and made a voter in 1859, and for six years thereafter supported himself and family there and paid his taxes. Whether he acquired a legal settlement there: *Quære*.

By his naturalization he became a citizen of the United States and of this state and by his subsequent residence in the defendant town became an inhabitant of that town.

From the defendant town he removed, as an inhabitant of that town, to the plaintiff town in 1866, where he resided until his death in 1870,

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supporting himself and family and paying his taxes. Held that he acquired a settlement in the plaintiff town.

[Argued October 6th—decided October 23d, 1885.]

ACTION to recover for supplies furnished to a pauper, claimed to belong to the defendant town; brought to the Superior Court in Tolland County, and, on a finding of the facts, reserved for the advice of this court. The case is fully stated in the opinion.

M. R. West, for the plaintiff.

D. Marcy, for the defendant.

PARDEE, J. John Dunn, an alien, came to Ellington, where he was naturalized and made an elector in 1859; and there he continued to reside until 1866 when he removed to Vernon. In this last town he was made a voter, and continued to reside until his death in 1876. In both places he supported himself and family and paid the taxes assessed against him.

Lizzie Dunn, the pauper in question, is his daughter, and was born in Ellington; she was ten years of age when her father died. She has never acquired a settlement in her own right. She came to live in Vernon in 1884. That town furnished support to her, but claims that her settlement is in Ellington, and sues for repayment of the money expended.

For the purposes of this case we may say that formerly the statute divided persons into three classes for pauper purposes.

First. Aliens, or those not inhabitants of this or any other state or territory or district of the United States, who may come to reside in any town in this state. These could gain a settlement only by a vote of the inhabitants or consent of the civil authority and selectmen.

Second. Inhabitants of some state, territory or district of the United States, other than this state, who may come to

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reside in any town in this state. These could gain a settlement only by admission, as provided for the previous class, after a year's residence in the town, or by the ownership in fee of real estate of the value of \$334, free from incumbrance, for the period of one year, the title if by deed being a matter of record during that time.

Third. Inhabitants of some other town in this state. These could gain a settlement in one of three ways: by admission, as provided for the first class; by owning and possessing real estate for one year of the value of one hundred dollars, free of incumbrance; or by six years residence, without becoming chargeable or neglecting to pay taxes.

John Dunn, the father, came to Ellington as a member of the first class. Neither the inhabitants by vote, nor the civil authority and selectmen by consent, conferred a settlement upon him. But we are asked to say that naturalization, followed by six years of continuous self-supporting and tax-paying residence there, is the legal equivalent of either of the statutory requisites for that class, and of its own force gave him a settlement there; that he went into Vernon as a person having a settlement in Ellington, a member of the third class, and consequently by his six years of continuous self-supporting and tax-paying residence in Vernon, there acquired a new settlement. In *Bridgeport v. Trumbull*, 37 Conn., 486, and in *New Hartford v. Canaan*, 52 Conn., 158, this court approached the question whether to the two statutory methods of acquiring a settlement it would add a third, a judicial one, and in both cases refrained from an affirmative answer; and we refrain now, a decision not being necessary to the determination of this case. But by his naturalization John Dunn became a citizen of the United States and of this state, and by his subsequent residence in Ellington he became an inhabitant of that town, and as such went thence to Vernon as a member of the third class, and there had a continuous, self-supporting and tax-paying residence during six years, thus complying with the statutory requirements for a settlement; and this he im-

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parted to his daughter, the pauper; and with her it remains.

The Superior Court is advised to render judgment for the defendant.

In this opinion the other judges concurred.

HUBERT B. GATES vs. THE BOSTON & NEW YORK AIR
LINE RAILROAD COMPANY AND OTHERS.

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Where a railroad company is chartered with power to take private property and to construct and operate its road, the authority given is in the first instance permissive merely, and no obligation rests upon the company to exercise the powers granted.

But where the company has taken private property and constructed its road, it has come under an obligation to carry into effect the objects of its charter, and its capital stock, franchises and property stand charged primarily with this public trust.

Where such a company is empowered to issue bonds and secure them by a mortgage of its franchise and all its property, the mortgagees take the mortgage subject to this trust.

Where such a company falls and the mortgage has to be foreclosed, the legislature has full power to authorize the bondholders, by a vote of a majority, and with an equal opportunity to all, to reorganize as a new corporation, with the rights of the old corporation, such authorized action being merely a mode of securing the performance of the paramount public trust.

And a dissenting minority have no private rights that can be successfully asserted against such action.

Where a mortgage was given to secure a large amount of coupon bonds which were to run twenty years, and contained a provision that they might be considered due by any bondholder on default of interest for six months and that the mortgage might then be foreclosed, it was held that each bondholder took his bond subject to this right of his co-bondholders, and could not, by electing not to have his own bond become due, obstruct the action of the majority.

Where the mortgage is made, under a provision of the charter, to the treasurer of the state, in trust for the bondholders, the treasurer in executing his trust may exercise a wide discretion within the scope of his powers.

And any bondholder, having no notice of the proceedings taken by the treasurer and by the majority of the bondholders with regard to

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the foreclosure of the mortgage and reorganization of the company, would yet be regarded as a party to them, represented by the trustee and the other bondholders.

There is no reason why, subject to legislative and judicial control, the majority in interest in common property, indivisible in its nature, consecrated to public use, should not so use the property as to advance the private interests in it and promote the public use.

[Argued October 7th—decided December 14th, 1885.]

SUIT for an injunction restraining the defendant corporation from ratifying a lease of its road, for the appointment of a receiver and for an account; brought to the Superior Court in Middlesex County, and heard before *Phelps, J.* Facts found and judgment rendered for the defendants. Appeal by the plaintiff. The case is sufficiently stated in the opinion.

S. L. Warner and *S. A. Robinson*, for the appellant.

1. The charter granted to the defendants, by which they were enabled to organize as a new corporation, and under which they claim to have extinguished the rights of the plaintiff under the mortgage of the old company, is so far unconstitutional and void. In any aspect of the case, even the most favorable to the defendants, the effect of the proceedings authorized by the new charter, if a legal effect is given to them, is to destroy the plaintiff's title to his own property, by an arbitrary act of the legislature and without the intervention of the court. In no possible aspect of the case can it be claimed that the plaintiff was not the owner of such share of the mortgage property, including the franchise, as his bonds bore to the whole issue. On this point it is immaterial whether that *pro rata* ownership was a legal or equitable interest, nor whether the foreclosure extinguished the lien on that particular property. The plaintiff had still an interest in the property, and his bonds, though not paid, were the muniments of his title thereto. In his bonds he had an absolute, unqualified ownership. It is even claimed that the legislature had the power to vest the property in the defendant corporation free from the trust character imposed by the contract; that the trustee by a

simple release may denude himself of the trust without the consent of the *cestui que trust* or the intervention of a court of chancery. By this it practically destroyed the plaintiff's bonds, though not due and not paid. It extinguished his equitable title to the mortgage estate as such without his consent, and, more than all this, it set up a corporation with power to liquidate the plaintiff's debt and mortgage interest on their own terms and by the payment of their own stock. It makes it compulsory on the defendants to exchange their bonds and surrender them, not for any determined or adjudicated value, not for cash, not for money, or any recognized legal tender, but for stock in a creature of the state. An act which deprives the creditors of a corporation of all remedy against its property, impairs the obligation of a contract and is void. *Curran v. State of Arkansas*, 15 Howard, 304, 311; *Stinger v. Knapp* 31 Verm., 1. A trustee cannot denude himself of the trust, or delegate it, without the consent of the *cestui que trust*. *Hill on Trustees*, 175; *Thrall v. Spencer*, 16 Conn., 142; *Goddard v. Prentice*, 17 id., 553. And the legislature cannot by an enactment vest the private property of one corporation in another without its consent. *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn., 48; *Derby Turnpike Co. v. Parks*, 10 id., 541. There are no equities, no legal rights, attaching to this property as among or against any one of the several bondholders, which do not accrue to any other separate holders of securities, secured by mortgage, after foreclosure. They cannot be characterized in any other way than as *joint and equal owners* of the mortgaged property, having no other priority than that stipulated in the bond. In no sense is the right of one subject to the domination of others, even a majority, any more than in any other joint ownership of tenants in common. But it is claimed that, without impairing the obligation of the contract, it was in the power of the legislature to change the trustee of the deed or authorize other parties to take the trustee's title. We insist that one of the chief values of a security of this kind is the

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personal character and standing of the trustee. The provision of our general statutes authorizing the class of mortgages to be made to the state treasurer, as in this instance, was made to give a greater value to the security. The purchaser of the bond in this instance took a bond with a trustee, who, with his successors, were the chief financial agents of the state. His position indicates his fitness for the trust, his knowledge of business, and aptitude for the performance of all the duties of the office. Moreover, the trust being authorized and imposed by sanction of the public law, the purchaser has a right to rely on a breach of its duties involving the trustee in the penalties of fine, imprisonment or impeachment, which the law of all society imposes. *Knapp v. Railroad Co.*, 20 Wall, 121, is much like this case. That case presents these facts: A mortgage of the Western Vermont Railroad Company to Knapp and Briggs, trustees; an absolute foreclosure by the trustees; afterward the Bennington and Rutland Railroad was organized; their charter authorized a majority of the bondholders to take the property, form a new corporation, and be substituted in the place of Knapp and Briggs; the act of incorporation vested the corporation with all the powers, privileges and franchises of the old road; the road had an outstanding lease, and afterwards the legislature declared the new corporation entitled to receive the rents accruing under the leases foreclosed. A suit was brought in the name of Knapp and Briggs, trustees. The case showed that they did not institute the suit and did not know of its being brought, and disclaimed all responsibility for it. Of course their names were used by some bondholder. The issue was on the rights conferred by the charter, and in effect the same as here presented. The court says: "It is not in the power of the state legislature without the consent of the *cestui que trust* to substitute a new trustee in place of the persons named in the mortgage. This would impair the obligation of the contract. The salability of railroad bonds depends in no inconsiderable degree upon the character of the persons who are to manage the trust.

If these persons are of well known integrity and pecuniary ability the bonds are more readily sold than if it was not the case. * * * To change them is to change the contract in an important particular, and this cannot be done without the consent of the parties for whose benefit the trust was created." The trustees, so far as the record discloses, have not been discharged of their trust, nor has the trust in fact been closed, for there are bonds outstanding which have never been paid or converted into the stock of the new corporation. It can make no difference whether these bonds are few or many. The trust continued until all are paid, unless in the meantime the trustees are discharged.

2. As to the power to lease. Of course it is conceded that the corporation has the general power to lease. Nor can it be denied that a general power is vested in the corporation to determine the form and character of the lease. But every corporate power of a general or specific character is subordinate to the general purpose of the organization. More than all, this power is subordinate to the principles of natural justice and equity attaching to the rights of the minority. And in the application of these principles the law treats the shareholders as having entered into a contract with the corporation and among themselves to expend their money to favor the prosecution of the scheme of the charter, not only as to the earning of the income but in its distribution. In this aspect the corporation is treated as among the stockholders as a co-partnership of perpetual duration. This lease in effect changes the whole purpose and scheme of the corporation. The common stockholder bought a right to the future earnings. The undertaking of the corporation and individual members was to preserve that right. It was not in the power of the stockholders against a single dissenting voice to vote that no dividends should be paid on this common stock, and what they could not do directly they cannot do indirectly by means of a lease. *Black v. Del. & Raritan Canal Co.*, 24 N. Jer. Eq., 455. "It is not in the power of seven shares out of eight to alter the manner in which it

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has originally agreed the profits should be divided." Lord ELDON in *Conat v. Harris*, Turner & Russ., 496, 525; Green's Brice's Ultra Vires, 552. And we insist that we are within the rule recently promulgated by the Supreme Court of the United States in the case of *Hawes v. Oakland*, 104 U. S. Reps., 460, where the court says an injunction will be sustained against a corporation at the instance of a stockholder, "where the majority of the shareholders are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of other shareholders, and which can only be restrained by the aid of a court of equity."

S. E. Baldwin, for the appellees.

STODDARD, J.* The New Haven, Middletown & Willimantic Railroad Company was chartered by the General Assembly of the state of Connecticut in the year 1867, for the purpose of constructing and operating a railroad from the city of New Haven to the village of Willimantic, and wholly within the territorial limits of this state. By its charter that corporation was invested with all the usual franchises and powers conferred upon railroad companies, including, of course, the right to take private property by the exercise of the right of eminent domain.

The capital stock was \$3,000,000, with the privilege of increasing the same to an amount not more than \$6,000,000.

The company was authorized to borrow money to an amount not exceeding at any one time one half of the amount actually expended for the construction and equipment of its road, and to secure repayment of the same by its bonds with or without coupons. Provision is made in the charter for securing these bonds by the execution of a mortgage of the "railroad and all its property, rights and franchises," to the treasurer of the state and his successors in office, in trust for the holders of the bonds.

* Judges *Beardsley* and *Stoddard* of the Superior Court sat in the place of Judges *Pardee* and *Granger*, disqualified by interest.

In pursuance of its chartered powers the company proceeded to build its railroad, and in 1869, having obtained stock subscriptions and partially completed the road, issued coupon bonds, either negotiable or not at the option of the holder, to the amount of \$3,000,000, and secured the payment thereof by a mortgage, as provided by the charter. In that mortgage it is recited that the company desired to borrow money "for the purpose of constructing and equipping said railroad," and proposed to make and issue such bonds "pursuant to the power and authority to that effect in said charter contained." The bond itself states that it is secured by a "first mortgage to the treasurer of the state of Connecticut upon the railroad of said company and all its property, rights, and franchises under its charter," and stipulates that, "should any of said interest coupons remain unpaid for six months after presentation and default, the principal sum secured hereby shall, at the option of the holder thereof, become due immediately."

The granting clause of the mortgage also conveyed the railroad, its appurtenances, rolling stock, and all other real and personal property, particularized at length, "which may now belong, or may at any time hereafter belong to said company, and be used as a part of said railroad, or be appurtenant thereto, or necessary for the construction, operation or security thereof; and also all the property, rights and franchises of the said company under its charter, and every part thereof, together with the tolls, income, issues and profits thereof, and all rights to receive the same, and everything necessary for the completion and operation of the road." In the habendum clause of the mortgage deed it is provided that the state treasurer in his official capacity is "to have and to hold the said property," &c., "subject to the terms and stipulations of said bonds and the provisions of the said charter under which the said company derives its powers."

Default was made in the payment of the interest, and under the terms of the bond and mortgage more than a majority in value of the bondholders elected that the prin-

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capital sum should be then due, and at their instance the then treasurer of the state brought his petition in equity to the May term, 1875, of the Superior Court, to obtain a decree of strict foreclosure of the mortgage. Such decree was had, a majority in value of the bondholders and the creditors being parties thereto. A plan of reorganization of the railroad had been proposed by a majority in value of the bondholders, which resulted in the foreclosure, and the passage by the General Assembly of the act incorporating the "Boston & New York Air Line Railroad Company."

A scheme for the re-organization of the management and ownership of the railroad having been assented to by the parties in interest, was referred to in the foreclosure decree. The time for redemption expired in June, 1875, and the foreclosure thereby became absolute.

On the 8th day of June, 1875, the General Assembly incorporated the new company. The act of incorporation recites that the interest of the bonds remains unpaid since November 1st, 1872; that foreclosure proceedings in behalf of the holders of the bonds are pending, &c., and that public convenience and necessity require a considerable further expenditure to complete and equip the road.

The capital stock consisted of forty thousand shares of \$100 each, thirty thousand of which is preferred stock, and ten thousand common stock. The preferred stock is to be issued "only in exchange for the first mortgage bonds of said company, at the rate of five shares for every bond of \$500, and ten shares for each bond of \$1,000."

The common stock is to be issued, first, for overdue and unpaid coupons detached from the bonds, and second, in satisfaction of certain legal and equitable claims existing against the road prior to the time the decree of foreclosure became absolute. The charter then provided that when a majority of the bonds had been exchanged for the preferred stock, and upon some other conditions, the trustee should convey to the new corporation all his title and interest in the trust property in fee simple, and then provided that such conveyance "shall be effectual to discharge him for-

ever from said trust, and to vest said premises with all the rights and privileges of the old corporation."

The charter then provided that no dividends shall be declared upon the common stock until dividends have been declared out of the net earnings of the railroad upon all of the thirty thousand shares of preferred stock, equal to seven per cent. a year thereon from the date of the last coupons on the first mortgage bonds, default on which was made prior to the time when the title of the trustee under the mortgage to the mortgaged premises became absolute by foreclosure. Then it is provided that the new corporation may issue mortgage bonds upon its property, under certain conditions and stipulations, by a vote of three-fourths of all the stockholders.

The plaintiff owned, prior to the re-organization scheme, bonds to the value of \$2,500, and "has never personally been a party to, or participated in, any of said proceedings, nor authorized any one to act for him or represent him, or been personally served with notice, nor has assented to them, and has not elected to have his bonds due, and still claims them as valid subsisting securities under said original first mortgage. He was not aware that said charter had been granted to the Boston & New York Air Line Railroad Company, or that said foreclosure decree had been made."

The broad claim is now made by the plaintiff, that, as he was not personally a party to the re-organization scheme, had no actual notice of it, and has not assented that his bonds should mature and the trustee be discharged, therefore his bonds with their coupons are outstanding subsisting obligations of the old corporation, charged upon this railroad property, and that either by an absolute sale, or by operation of the railroad by the trustee, said property and franchises must be appropriated to the discharge of the obligations held by him, notwithstanding that a different mode of appropriating the property in liquidation of the bonds has been agreed upon by a majority of his co-bond-

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holders, and has been sanctioned by the state and by a court of equity having jurisdiction of the subject-matter.

The plaintiff's contention in this behalf rests upon his assumption that he has a constitutional property right to have the property appropriated in the manner claimed by him.

In making this claim the plaintiff ignores, or subordinates to his own claim, both the private rights of his co-bondholders and public rights vested in trust in the state, while upon every true theory and exposition of his contract the rights of the public are superior to his private rights, and the rights and interests of his co-bondholders are equally with his own to be protected by the law. The plaintiff's argument treats this matter as one of strict legal private right of an individual creditor, against or to private property of an individual debtor, instead of a claim of exceptional character upon property of peculiar nature, in which private rights of others and the right of the public exist, which must be regarded and protected.

One public right consists in the continuous uses of the railroad, its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter. All these corporate franchises and this property are held subject to, and charged with, this obligation.

It is true that the charter is permissive in its terms, and probably no obligation rests upon the corporation to construct the railroad; the option to exercise the right of eminent domain and other public rights is granted. And when that option has been made, and the corporation has located and constructed its line of track, exercising the power of the state in taking property of others, and in so locating and constructing its road, has invited and obtained subscriptions upon the implied promise to construct and operate its road, has commenced to operate the road under the granted powers, thereby inducing the public to rely, in their personal and business relations, upon that state of affairs; by so accepting and acting upon the chartered powers a contract exists to carry into full effect the objects

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of the charter, and the capital stock, franchises and property of the corporation stand charged primarily with this trust. The large sovereign powers given by the state to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Having exercised those powers the corporation has no right against the will of the state to abandon the enterprise, tear up its track, and sell its rolling-stock and other property, and divide the proceeds among the stockholders.

The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the state, certain destruction of private property in which whole communities created and existing upon the faith of the continuous use of the chartered powers are interested, and, indeed, the life of the citizen as well as his property rights are thus jeopardized. Upon principle it would seem plain that railroad property once devoted and essential to public use, must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that this public right, existing by reason of the public exigency, demanded by the occasion, and created by the exercise by a private person of the powers of a state, is superior to the property rights of corporations, stockholders and bondholders.

To this effect also is the weight of authority. In the following cases are illustrations of the general principle: *High on Mandamus*, §§ 315, 316, 317; *State v. Hartford & New Haven R. R. Co.*, 29 Conn., 538; *R. R. Commissioners v. Portland & Oxford R. R. Co.*, 63 Maine, 278; *Attorney Gen. v. West Wisconsin R. R. Co.*, 36 Wis., 466; *The People v. Albany & Vermont R. R. Co.*, 24 N. York, 261; *The People v. Long Island R. R. Co.*, 31 Hun, 127; *Attorney Gen. v. Southern Minnesota R. R. Co.*, 18 Minn., 40; *In re N. Brunswick & Canada Ry. Co.*, 1 Pugsley & Burb., (N. B.,) 667; *York & North Midland Ry. Co. v. The Queen*, 1 El. & Bl., 858.

The American and English cases which seemingly doubt these propositions place their conclusion upon the con-

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struction of the particular chartered powers and obligations.

In the case at bar there are special provisions of the charter and of the bond and mortgage which indicate an intent to impose this trust characteristic upon the franchise and property of this corporation. By the charter the corporation was given power to construct and operate the whole intended line of railway, to obtain subscriptions to the capital stock, and to borrow money and issue its bonds, and mortgage its property therefor, for that special object and purpose. The bond on its face purports to be part of an issue secured by mortgage on this railway property and franchises. The mortgage securing the bond recites that the corporation has obtained capital stock-subscriptions "for the purpose of constructing and equipping said railroad," states that the corporation desires to borrow money and issue bonds therefor "pursuant to the power and authority to that effect in said charter," covers not only the visible property but the franchise to operate the road, and conveys the property and franchises "subject to the terms and stipulations of said bonds and the provisions of the said charter under which the company derives its power."

It is apparent that the bondholders loaned the money and took their bonds with the security with full notice that the security for the loan was first pledged to the performance of a public trust.

The necessary conclusion is that the state has a right to enforce the continuous exercise of the corporate powers and franchises for public use, to the exhaustion of the value of such property and franchises; and this is true, no matter what private right may embrace the title of the property.

In this state, irrespective of legislative or judicial authority in the special instance, the effect of a foreclosure is to vest absolutely the property of the mortgagor in the mortgagee. It simply cuts off the right of redemption existing in the mortgagor, and thereafter the mortgagee stands with reference to the mortgaged property in the same relation as did the mortgagor. He has the title of the

former owner of the equity, and nothing more. He holds the property subject to all charges, duties, pledges and equities existing prior to the execution of the mortgage deed. We have not adopted the practice of selling the property upon foreclosure. Necessarily, therefore, if the trust mortgage was rightfully foreclosed, and the title vested in the trustee in trust for the first mortgage bondholders, the trustee and the beneficiaries of the trust continue to hold the property, subject to the same limitations, duties and obligations resting upon the original corporation, including of course the obligation to execute the public trust east upon the mortgaged property by devoting it to the public use for which it was created. This property could not be relieved from this trust without the acquiescence of the state. But the state has explicitly declared the public intent that the franchises and property vested in these bondholders should continue to be devoted to the public use declared in the original charter, and has created a new corporation for that purpose. In the organization, control and management of this new corporation, and in its property and franchises, the plaintiff is, by the incorporating act, entitled to share proportionally with all the other bondholders. The new corporation is an instrumentality adopted by the state, with the acquiescence of a majority of the bondholders, for carrying into effect the original design, and devoting the property to the only use which the law of its creation permits; and in thus applying the trust property to the object and purposes of the trust, no right of the plaintiff is impaired, so long as he retains his original *pro rata* share in the trust property, subject to the execution of that trust and the expenses necessarily incident thereto.

So too in relation to the other bondholders, it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same existent right in every other holder. His absolute right of control is limited not only by the express provisions of the bond

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and mortgage, but also in great measure by the peculiar nature and character of the security. *Canada Southern R. R. Co. v. Gebhard*, 109 U. S. Reps., 534, 537. "To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretence, even, of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders secured by a railroad mortgage bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust." *Shaw v. Railroad Co.*, 100 U. S. Reps., 611, 612.

This mortgage security is an entirety; it is indivisible, and there can be but one foreclosure of that mortgage. The bond on its face provides that "should any of the said interest coupons remain unpaid for six months after presentation and default, the principal sum secured hereby shall, at the option of the holder hereof, become due immediately;" and the mortgage has substantially the same provision. A majority of the bondholders exercised such option, and their bonds matured.

A statute authorized the trustee to foreclose the mortgage. That power probably resided in the trustee irrespective of that statute. The law of the place where a contract is made is part of the contract, as if incorporated in terms therein. The holders of these bonds hold them subject to that law. When it was provided in the bond and mortgage that the bonds were payable in twenty years from date, it was also provided by the bond, the mortgage, and the law, that under certain circumstances, at the option of the bondholders and the trustee, the bonds should mature

and the mortgage be foreclosed before that time, thus preventing the contemplated running for twenty years. The provision that the bond should continue for twenty years an outstanding subsisting security, if any existed, was with reference to the corporation. The provision that the bonds by the action of the bondholders might mature before that time, was in reference to the co-bondholders. And while it would impair the obligation of a contract, if such contract existed, so far as the corporation is concerned, to change the time of maturity, it does not have that effect when the co-bondholders proceed upon their common and undisputed right to cause the bonds to mature, and by foreclosure to discharge the bonds by taking the property in a legal way.

Primâ facie the foreclosure of the mortgage security operated to discharge the mortgage indebtedness. The equitable title of the property was in the beneficiaries of the trust. The trustee was not selected because of his personal fitness or qualities; he was a state official, as are also his successors in office, designated by law as matter of convenience and public policy, and not selected by contract of the parties to the mortgage. He had no active duties in relation to the trust except those imposed by statute and the charter. And this charter was open to repeal. In these particulars the rights of the beneficiaries under the trust to the continuance thereof are very different from the rights existing under an ordinary active trust created by act and contract of the parties.

When the legislative power, which upon grounds of public policy created the trust, upon like grounds willed that such trust should cease, and vested the property, absolutely denuded of the trust, in the beneficiaries, at the instance of a majority in value of them, no right of a dissentient beneficiary is affected. The trust does not rest upon contract, and was created with the express reservation that the state might at will terminate it.

The purposes of the trust had been accomplished. The property had been appropriated by the foreclosure, so far as it could be by the parties, to the discharge of the bonds,

and the scheme of re-organization provided for the distribution of the trust property among those entitled to it, subject to the duties and obligations to the public originally fixed upon it. This distribution was sanctioned by the judgment of a court of equity having jurisdiction. The effect of these proceedings was to vest in the bondholders all the property and the franchises of the original corporation that could be transferred by judicial proceedings. But the then owners of the corporate property were not a corporation; they were simply an aggregation of common owners; but it is obviously impossible for a numerous body of part owners widely scattered in many jurisdictions, and varying from time to time in the personal composition of that body, to operate a railroad; so it is equally inadmissible as a question of public policy that the attempt should be made. The General Assembly, therefore, provided for the new corporation, the stock of which represented the interest of the owners of the property. This or some similar course must be pursued, and it seems to be suggested in the case of *Sturges v. Knapp*, 31 Verm., 1, cited by the defendants. This was a case where the court regarded the trustees as "selected, doubtless, with reference to their capacity and responsibility for this very contingency both by the corporation and the *cestuis que trust*, and neither of these parties had stipulated to deal directly with the other, but only with the trustees as the responsible party." Page 55. "The trustees seem to have been selected for this very office, among others, of controlling and managing the property in case of forfeiture and surrender, as trustees for the benefit of the *cestuis que trust*, in order to make it available for the payment of the bonds, both interest and principal. This must be so until some organization of the bondholders, and the acquiring of some capacity to act by a majority, or in some such way as to enable them to discharge this new class of duties thrown upon them by the forfeiture of the condition of the mortgage and the surrender of the road with its incidents and fixtures." Pages 56, 7.

To these legislative and judicial proceedings, enactments

and decrees the plaintiff was a party represented by the trustee and a majority of his co-bondholders. The interests of all persons are bound by a public act of the legislature acting within the scope of its jurisdiction. And it is manifestly impracticable that provision should be made for actual personal notice to all the bondholders under railroad mortgages of judicial action in reference thereto. The bonds are negotiable, passing by delivery from hand to hand, and scattered, in many instances, to all parts of the civilized world. Power is therefore lodged with the trustee to exercise a wide discretion in reference to the administration of his trust, to apply to the courts for judicial action when deemed for the best interest of the *cestuis que trust*, and to bind them in relation thereto. And the familiar practice in chancery proceedings where it is practically impossible to bring by personal notice all individuals of a numerous class into court, is to proceed with a sufficient number in that interest to properly represent it.

The designation of a state official as the trustee provides a person uninfluenced by personal considerations, independent of the action or control of any portion of the bondholders, and who may be relied upon to carry into full effect the original design of his trust.

A trust of the character in question can be determined by the decree of a court of equity upon proper occasion, certainly at the request of a majority in interest of the *cestuis que trust*, and, at all events, when fortified by the concurring sovereign will of the state, and when the proportionate interests of all the owners of the property are preserved, and the estate is applied to the use for which it was created, and subject to which it is held at all times and by all persons.

A mortgage is provided for in the scheme of re-organization, to be issued by the new corporation, in the first place to pay or secure the payment of certain sums contracted in operating the road while held in trust, and, in the second, to provide for the future operation of the road by the new corporation.

It results from the view that we have taken of the contract with the bondholders, that these are objects within the scope of their contract, and that the property is lawfully subjected to this prior mortgage to accomplish these ends.

So far as the common stock is concerned, it is provided by the charter that no right to a dividend upon this stock is acquired "until dividends have been declared out of the net earnings of said railroad upon all of said thirty thousand shares of preferred stock, equal to seven per cent. a year thereon from the date of the last coupons on said first mortgage bonds, default on which was made prior to the time when the title of the trustee under said mortgage to the mortgaged premises became absolute by foreclosure." Thus is secured to the holders of the bonds the rate of interest originally contracted for, if the property should earn enough to pay that amount.

A question is made as to the power to lease. It is not necessary to dwell on this subject here; the substance of the matter is disposed of in the case of the town of Middletown against the same corporation, a companion case to this, and argued in connection with it. (*Post*, p. 351).

This additional suggestion may be made in this case, that the charter of the first corporation gave the same power to lease this property that is given to the new corporation; and, as has been already stated, upon the foreclosure the franchises and property of the old corporation were taken and held by the plaintiff and his associates, subject to the limitations, restrictions, and chartered powers and regulations as to the performance of public duties that were imposed upon the first corporation; and there are no facts in this case to indicate that the lease in question was not for the best interests of all concerned, both private persons and the public generally. There is no reason why, subject to legislative and judicial control and direction, the majority in interest in common property, of indivisible nature, consecrated to public use, should not so use that property as to advance the private interests in that property and secure the public welfare.

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There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

THE TOWN OF MIDDLETOWN *vs.* THE BOSTON & NEW
YORK AIR LINE RAILROAD COMPANY.

53	351
53	350
53	351
57	106

The bondholders of a railroad company were, after foreclosure of a trust mortgage of the road, incorporated as a new company to succeed to all the rights of the old, with a provision that the capital stock should be forty thousand shares, of which thirty thousand should be preferred and ten thousand common stock, and that no dividend should be made on the common stock until after one of seven per cent. had been made on the preferred. The charter of the old company gave it power to lease the road to any other connecting company; that of the new company requiring a vote of three fourths for the purpose. Held that the company had power, by a three fourths vote, to lease the road for ninety-nine years to a connecting road at a fixed annual rental.

And the court refused to set aside such a lease although the entire rental was but four per cent. on the preferred stock, and was to go, not to the company, but directly to the preferred stockholders as a percentage on their stock.

By the defendant company's charter the old bondholders were authorized to convert their bonds into its stock. The plaintiff town was a holder of some of the common stock. Held that it could not, in its suit to set aside the lease, avail itself of the fact that some of the bondholders of the old company had not exchanged their bonds for stock and denied the validity of the organization of the new company.

Nor of the fact that no provision was made in the lease for the payment of certain creditors of the company.

Injuries to bondholders or creditors can be shown and redressed only when they complain of them.

[Argued October 8th—decided December 14th, 1885.]

SUIT for an injunction against the leasing of a railroad; brought to the Superior Court in Middlesex County.

The complaint alleged that the New Haven, Middletown & Willimantic Railroad Company was incorporated by the legislature of this state in 1867 with power to construct and operate a railroad between the city of New Haven and the borough of Willimantic, and that it did construct and

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begin to operate such road; that by its charter the several towns on the line of the proposed road were empowered to aid the company by subscribing for its stock, by advancing money and their bonds to the company, and by guaranteeing its bonds; that the several towns on the route had thus advanced or become obligated for over \$2,000,000 for the company; that the company was authorized to issue three millions of coupon bonds, payable in twenty years, secured by a mortgage to the state treasurer as a trustee for the bondholders, of its franchise and all its property, such bonds to become due at the option of any holder on six months default of payment of any interest coupons; that such bonds were issued and disposed of in the market; that the company made default in its interest and the mortgage was foreclosed by the trustee; that the bondholders, under a resolution of the General Assembly were immediately after, in 1875, incorporated as a new company by the name of the Boston & New York Air Line Railroad Company, the present defendants; that by the act of incorporation the stock of the new company was to consist of forty thousand shares of the par value of one hundred dollars each, of which thirty thousand were to be preferred stock and ten thousand to be common stock; that every holder of stock, whether preferred or common, was to be entitled to one vote in the meetings of the company for every share of the stock; that no dividend was to be made on the common stock until one of seven per cent. had been made on the preferred from the earnings of the company; that the plaintiff town was the owner of eleven hundred and twenty shares of the common stock and had been so before the transactions to be stated; that the common stock before these transactions had been worth in the market twenty-five dollars a share, making the whole stock held by the plaintiff worth at that time twenty-eight thousand dollars; that the defendant company had in September, 1882, made a preliminary contract for a lease of the road to the New York, New Haven & Hartford Railroad Company for ninety-nine years from September 30th, 1882, at an annual

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rental of \$120,000, and was about at a meeting of the company to ratify and establish the lease; that this rental was to be paid, not to the defendant company, but to the preferred stockholders directly by a certain percentage on their stock; that there was a large amount of unpaid taxes and other claims on the property not provided for in the contract; that the entire income and resources of the property were thus placed out of the control of the corporation and were appropriated for the benefit of the holders of the preferred stock in fraud of the holders of the common stock, and that the common stock would become worthless if the transaction was carried out; praying for an injunction against the approval and adoption of the lease by the defendant company.

The charter of the New Haven, Middletown & Willimantic Railroad Company, to all the rights of which the defendant company had succeeded, was annexed to the complaint and made a part of it. By it that company had the right to lease its road to any other railroad company whose road connected with theirs. By a provision of the charter of the defendant company such lease could be made only upon a vote of three fourths of all the stockholders voting by shares of stock.

A temporary injunction was granted by a judge of the Superior Court and afterwards dissolved, and the lease was executed. The case was thenceforth treated as a suit to set it aside. The defendants demurred to the complaint, assigning the following grounds of demurrer:—

1. It is wholly grounded on the alleged invalidity of such a lease as the defendant is about to make, whereas said lease, if made, would be valid.

2. Said complaint alleges that said lease is invalid as against certain third parties, such as creditors of the defendant or owners of bonds of the New Haven, Middletown & Willimantic Railroad Company, who are not parties to this action; whereas the only question properly arising in this action is whether such lease would be invalid as against the plaintiff.

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3. Said charter of the defendant and all its proceedings thereunder, in said complaint alleged, are legal and valid.

4. The plaintiff, being a stockholder of this defendant, cannot in this action question the validity of its organization, or its right to take, hold and dispose of said railroad.

5. Said complaint states no case calling for an injunction or other equitable relief, as demanded therein.

The court (*Phelps, J.*) sustained the demurrer and rendered judgment for the defendants. The plaintiff appealed.

S. L. Warner and *A. W. Bacon*, with whom was *S. A. Robinson*, for the appellant.

1. The provisions of the charter of the defendant company, so far as they authorize such a lease, are themselves of no effect, as impairing the obligation of a contract. All the subscribers to the stock of the defendant company made their subscriptions with a full knowledge of the terms of its charter, and in so doing they contracted with one another that that charter should be maintained in all its provisions. The law upon this point is clearly and vigorously stated in the case of *Kean v. Johnson*, 1 Stockt. Cha. R., 401, where a court of equity granted an injunction for a lesser offense than appears upon this record. The court say, on page 407: "As stockholders they own the road in common, to be employed in specified uses. Each has a share in the whole, and is to have a proportionate share in its profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road and in every dollar it earns. The directors are their trustees to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen they may reap the contemplated profits. And this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine within the scope of this mutual contract, they each agree to abide by; but there their mutual contract ends, and no majority, however large has a right to divert one cent of the joint capital to

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any purpose not connected with and growing out of this original fundamental joint intention." If this is a violation of the "original fundamental joint intention," as expressed in the charter, a court of equity will enjoin against the consummation of such a contract. Pierce (on Railroads, p. 530,) says: "Equity will enjoin a corporation and its officers, at the suit of a stockholder, from entering into contracts or engaging in transactions which are in violation of the charter and involve a breach of trust on the part of the corporation and its officers." The same principle is laid down in our own state. *Pratt v. Pratt*, 33 Conn., 446; *Terry v. Eagle Lock Co.*, 47 id., 141.

2. This action of the defendants is in express violation of their charter. By the terms of that charter, subscribers to the common stock of the defendant company have the right to expect and the power to compel the officers and directors of that corporation to so manage its affairs as to make the preferred stock pay a dividend of seven per cent. and then divide the surplus among the holders of the common stock. The possibility of such a result gave the common stock its value of \$25 per share. The corporation and its officers and stockholders were charged with a trust to bring about such a result, which by this lease they evade and abrogate. This unusual power is claimed by the defendant company because of the power given them to lease their road by their charter and the statutes of the state. But a power to lease gives the company no power to make such a lease to the injury of a single stockholder or a class of stockholders. 1 Redfield on Railways, 72. The acceptance by the majority of a corporation of an amendatory act does not bind the minority. *New Orleans &c. R. R. Co. v. Harris*, 27 Miss., 517. In this case the court say:—"The incapacity of the majority to alter fundamentally the charter, against the consent of even a single corporator, was recognized by the vice-chancellor in the case of *Cunliff v. Manchester & Bolton Canal Co.*, 2 Russ. & Mylne, 480, note." The court further say, (p. 540:)—"When a person becomes a member of an incorporated company by his subscription to the stock, he

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agrees to be bound by the terms of his contract as defined in the charter of incorporation; he agrees to be bound by the acts of the corporation and its officers performed within the scope of the charter powers; but upon no principle can it be held that he impliedly consents to any alteration which would work a radical change in the structure of the association, which might be voted or accepted by a majority of the whole of the corporators, and thereby be subjected to burdens and obligations wholly foreign to the purposes and objects of the original charter." An act beyond the scope of the constitution of the company requires the consent of all the members. *Burmeister v. Norris*, 21 Law Jour. N. S. Exch., 43. In *Kent v. Quicksilver Mining Co.*, 78 N. York, 159, the court say:—"A private corporation cannot repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law, and this although the power is reserved by its charter to alter, amend or repeal its by-laws." And the court further say:—"Upon the purchase of shares of the stock of such a corporation, and the issue to the purchaser of the certificates therefor, he acquires a vested right, and any action of the corporation which divides the shares of its stock sold and in the hands of lawful owners into two classes, and gives to one class a preference over the other in sharing the earnings of the corporation, materially and injuriously affects the rights of the owners of the latter class, and if without their assent or acquiescence, is illegal." In *Da Ponte v. Northern Pacific R. R. Co.*, 21 Blatchf., 534, WALLACE, J., says:—"An action by a shareholder against a corporation to restrain it from a contemplated transaction which is ultra vires may be maintained by the stockholder, and must be sanctioned by the court, although all the other stockholders of the corporation are willing to assent to and affirm the proposed course of action. In such a case the question is not one of discretion or expediency. The right of the stockholder to maintain the action and enjoin the transaction is personal to himself and independent of any right or interest of the corporation, and must be recognized although all the other

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members are arrayed against him. It seems to be a clear, unquestioned principle of law that a majority of a corporation cannot impair the rights or increase or affect the liability of any member of the corporation." *Trustees of Free Schools v. Flint*, 13 Met., 589; *Peabody v. Flint*, 6 Allen, 52; *Flint v. Pierce*, 99 Mass., 69; *Black v. Del. & Raritan Canal Co.*, 24 N. Jer. Eq., 455; *Const v. Harris*, Turner & Russ., 496, 525; Green's Brice's Ultra Vires, 552; *Hawes v. Oakland*, 104 U. S. Reps., 460. Of course the court can see that this action completely annihilates the common stock of the defendant company. If this lease is valid for ninety-nine years, at the expiration of that term it can be renewed for ninety-nine years more, and so on till the end of time, thus blotting out the common stock forever.

S. E. Baldwin, for the appellees.

* BEARDSLEY, J.—This case comes before this court by appeal from the judgment of the Superior Court that the complaint is insufficient. The plaintiff alleges, in substance, that it is the owner of eleven hundred and twenty shares of the common stock of the defendant company; that said company is about to lease its railroad to the New York, New Haven & Hartford Railroad Company for the term of ninety-nine years, at the annual rental of \$120,000, to be paid by the lessee to the preferred stockholders of the defendant company, in proportion to the amount of stock held by them respectively; praying for an injunction against the proposed lease. A preliminary injunction was issued upon this complaint by the Superior Court, which was afterwards dissolved, and the lease was executed. The plaintiff now seeks to have the same set aside, claiming that it violates its rights as such holder of common stock by depriving it of any participation in the earnings of the defendant company for the period of the lease and rendering its stock of little or no market value.

Whether the defendant has the right to make this lease

* Judges BEARDSLEY and STODDARD of the Superior Court sat in the places of Judges PARDEE and GRANGER, disqualified by interest.

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must of course depend upon the provisions of its charter. If the charter authorizes the lease, the fact, if it be so, that it will reduce or destroy the market value of the plaintiff's stock, cannot defeat the right of the company to make it. The plaintiff, as a stockholder in the defendant company, is subject to all the conditions contained in its charter affecting its relation to the other stockholders as well as to the public. By the defendant's charter the bondholders of the New Haven, Middletown & Willimantic Railroad Company were incorporated into a new company, which succeeded to all the property and rights of the old one. The charters of both these companies, and the lease in question, are made part of the plaintiff's complaint. The charter of the New Haven, Middletown & Willimantic Railroad Company provided that the company might lease its road to any railroad company with whose road it might intersect. (Sec. 7 of charter.)

The defendant's charter provided that it should not so lease without the approval of three fourths of the stockholders of the company. (Sec. 9 of charter.)

The defendant's charter also provides that the capital stock shall consist of not over forty thousand shares, of which not exceeding thirty thousand shares shall be preferred stock, and not exceeding ten thousand shares shall be common stock, (secs. 2 and 3 of charter,) and that no dividends shall be declared upon the common stock until dividends have been declared upon all the preferred stock, equal to seven per cent a year thereon. (Sec. 5 of charter.) The shares of stock being of the par value of \$100 each, the rent received will amount to only four per cent upon the preferred stock.

But it is claimed that although there is no restriction in the language of the charter as to the term for which the company may lease its road, or as to the rent to be received, yet it is unreasonable so to construe it as to enable three fourths of the stockholders to make a lease which deprives the other fourth of any chance for dividends for so long a period, and hence that the lease in question is not a rightful and lawful exercise of the power given by the charter. We

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see no ground for this claim, especially in view of the fact that leases of railroads are, and from the nature of the case must generally be, made for long terms. Railroads are leased, as they are built, with a view to the advantages to arise in the distant future from the development of population and business in the neighborhood by the facilities for transportation which they afford.

The complaint also charges that by the provisions of the lease the entire resources of the defendant company from which income can be derived are fraudulently appropriated for the benefit of the holders of the preferred stock. This is not a charge of fraudulent conduct or intent in the making of the lease, but only that by its operation the income will be fraudulently appropriated for the benefit of the preferred stockholders. This is simply an allegation that this appropriation of the income will be disastrous to the common stockholders and wrongful; not that the preferred stockholders have acted fraudulently. If the company had the right, as it clearly had by its charter, to make the lease upon a three fourths' vote, the court can not regard the effect of the lease as wrongful, or in any proper sense fraudulent. *Van Weel v. Winston*, 115 U. S. Reps., 287.

The complaint also charges that certain of the bondholders in the old company have not converted their bonds into stock, and deny the validity of the organization of the new company, and that by the contract of lease no provision is made for the payment of certain creditors of the company. If this be so, we do not see upon what principle the plaintiff can avail himself of it as a ground of relief in this case. Injuries done to bondholders or creditors can only be made apparent and redressed when they complain of them.

The questions arising between the defendant company and a bondholder who claimed that he had not converted his bonds into stock, were determined adversely to the bondholder at the present term of this court. *Gates v. Boston & N. York Air Line Railroad Co.* (supra, p. 333.)

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

ABRAM J. KNOWLES vs. LEVI G. NORTHROP.

Upon the trial of an action of ejectment it had been an important question affecting the title whether the father and mother of the plaintiff had ever been married, and the plaintiff had introduced a certificate of their marriage purporting to be signed by a certain magistrate since deceased, and by *E* and another as witnesses. The defendant also introduced witnesses who testified that in their opinions the certificate was not that of the magistrate; but the jury had rendered a verdict for the plaintiff. The defendant brought a suit for a new trial on the ground of newly discovered evidence, alleging that he had found several witnesses who would testify that *E* was in Louisiana at the time the certificate was dated, and several others who would testify that one *L*, at the request of the plaintiff's father, wrote the certificate and signed the name of the magistrate to it. Held that, while it is a general rule that a new trial will not be granted for newly discovered evidence that is merely cumulative, yet such direct evidence of the forgery was something so unusual that the defendant could not have been expected to inquire after it, while it was so apart from the ordinary mode of proving a forgery that it could not properly be regarded as merely cumulative.

And the discrediting of the certificate by proof of the absence of *E*, whose name was appended as one of the witnesses, was regarded as standing upon the same ground.

[Argued October 8th—decided October 23d, 1885.]

ACTION for a new trial on the ground of newly discovered evidence; brought to the Superior Court in Litchfield County. Demurrer to the complaint. Heard before *Torrance, J.* Complaint held insufficient and judgment rendered for the defendant. Appeal by the plaintiff. The case is sufficiently stated in the opinion.

H. W. Taylor, for the appellant.

L. D. Brewster, for the appellee.

PARDEE, J.—This is a complaint asking for a new trial for newly discovered evidence.

In 1881 the defendant brought an action of ejectment against the plaintiff and recovered judgment. In the trial

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of that cause it was a material question whether Gad Northrop and Cordelia Dennis, father and mother of the plaintiff, were ever lawfully married. In support of the claim that they were so married, the plaintiff, with other evidence, offered and the court received what purported to be a certificate of such marriage signed by the officiating magistrate and by Thomas Lee and Morgan L. Emeigh as witnesses of the ceremony.

The present complainant alleges that since that trial he has learned that at least seven persons will testify that during several months prior and several weeks subsequent to the date of that certificate, Morgan L. Emeigh, one of the persons whose names are thereto appended as witnesses, was in the state of Louisiana; and that at least six persons will testify that one Zeno A. Lassing, at the request of Gad Northrop, prepared the certificate and signed thereto the name of the magistrate without his authority. Also that, although he used all reasonable diligence in preparing his case for trial, he was unable to discover the evidence aforesaid before the close thereof. The defendant demurred, "because on the facts stated the plaintiff is not entitled to the relief therein sought, and because it sets forth only such evidence as goes to prove the invalidity of said certificate, whereas the evidence offered on the trial of said case abundantly proved the said marriage without reference to said certificate, and the alleged newly discovered evidence would make no difference with the result of the case and would not be sufficient to turn the case in favor of the defendant." The Superior Court sustained the demurrer.

Upon the trial of the action of ejectment the plaintiff introduced as a witness his mother, who testified to the marriage; no other person did so. Others testified that the father and mother were at the home of the latter on the night named in the certificate; that during many years thereafter they lived together as husband and wife, and that the father introduced her as his wife. The plaintiff also put in evidence a record of the marriage, of the age of the mother, of the birth of the son, and of other family

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items in the family Bible, which he claimed were made by the father; also evidence that immediately before or at the birth of the son the mother spoke of Gad Northrop as being her husband; and that the father pointed out to the son the place of the marriage. The defendant offered evidence tending to prove that the marriage certificate was a forgery; and claimed that the living together of the father and mother was always unlawful.

For the purpose of testing the sufficiency of the demurrer we are to assume that the present complainant can now present in court several persons who will testify that it is physically impossible that Morgan L. Emeigh could have been present at the marriage of the father and mother of the defendant, as the certificate declares him to have been; and several others who will testify to their actual knowledge of the forgery of the certificate at the instigation of the father. In the trial of the action of ejectment the plaintiff introduced the certificate, doubtless because he thought it would weigh in his favor; and in view of the nature and character of the evidence introduced by the parties respectively, his belief was well founded. If upon another trial witnesses testify in accordance with the complainant's allegation, it is the right of the jury to believe them; and if jurors believe that Gad Northrop procured a forged certificate, they may and probably will believe that he did so because he could not procure a genuine one. They may well rely upon this rule as governing men in such matters, namely, that they prefer a genuine document to a forged one.

It is true that upon the former trial the defendant introduced witnesses who testified that in their opinion the signature affixed to the certificate was not that of the magistrate, and this is denying the genuineness of it in one form; and the introduction of witnesses who were eye witnesses to the act of forgery is doing the same thing in another form.

When the certificate was offered in evidence, if the defendant believed it to be a forgery, he had the right to rely (the magistrate being dead), upon the result of a compari-

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son of signatures to substantiate his position. Instances wherein forgers have left eye witnesses to their acts, who can be found and called into court and made to testify, are so rare that the defendant was not required to know or suspect the existence of such. Upon such an inquiry the testimony of persons who were witnesses to the act of forgery stands by its character so entirely apart from the testimony of those who give opinions upon comparison of signatures, that the former species in reality constitutes evidence tending to prove a new and independent fact. And the same remark is applicable to the testimony of those persons who will testify that Emeigh, one of the witnesses, was in Louisiana when the certificate declares that he was in New York.

There is error in the judgment of the Superior Court.

In this opinion the other judges concurred.

WALSINGHAM LEE'S APPEAL FROM COMMISSIONERS.

Where a son remains at home and performs services for his father under a general expectation that the latter will compensate him by his will or otherwise, and leaves the amount and mode of compensation to his father's judgment, and the father does in fact make some provision for the son by will or otherwise, the son is bound by the provision made, whether satisfactory or not.

[Argued October 13th—decided October 23d, 1885.]

APPEAL from doings of the commissioners on the estate of Mortimer F. Lee, in disallowing a claim of the appellant; taken to the Superior Court in Hartford County, and tried to the jury in that court before *Sanford, J.* Verdict for the appellant, and appeal to this court by the appellee. The case is fully stated in the opinion.

F. L. Hungerford, for the present appellant.

A. P. Hyde and *J. J. Jennings*, for the present appellee.

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PARK, C. J. On the trial of this case in the court below the plaintiff offered evidence to prove, and claimed that he had proved, that he lived at home with his father and mother till he became of age, when he desired to have some understanding regarding the wages he should receive if he remained at home; that his father told him that he was working for his, the son's, interest as well as his own; that it would be better for him to remain at home, and that when he, the father, died, the son would have everything; that relying upon this assurance he remained at home during most of the time for the eight years next following, laboring for his father upon his farm and assisting him about his business; that his father never made him any compensation in his life time and left him nothing of value by his will; and that therefore his estate was indebted to him for his services.

On the other hand the defendant offered evidence to prove, and claimed that she had proved, that the father was a man of moderate means, not worth more than five thousand dollars when his son became of age, and at the time of his decease; that he was a hard working, industrious man; that both he and his wife were attached to the plaintiff as an only child; that the wife was wholly without means of support; that the son remained at home after his majority under an expectation that his father would make provision for him by will or otherwise; that there was no express agreement as to what such provision should be, or how it should be made; that there was no expectation on the part of the son that his father would leave him his entire estate to the exclusion of his mother; that the son had confidence in the integrity and justice of his father, and was willing to leave it for him to do what was right to compensate him by his will or otherwise for his services, and to reimburse him for the money expended and loaned as stated in the plaintiff's bill; that after the son became of age he worked in a factory for a considerable time for his own benefit, and also engaged in private business on his own account; that he went to school at the expense of his father, and finally mar-

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ried in 1878 and left home, and from that time ceased to perform any services for his father; that down to the time of his marriage, except when away at school, he lived in his father's family as a member of it without paying board, and that the father just before his death gave him a deed of land worth about three hundred dollars, and also made valuable provision for him in his will.

Upon the case thus presented the defendant asked the court to charge the jury as follows: "That if the son remained at home and performed services and expended money under a general expectation that his father would make it right, by will or otherwise, when he died, and left it to his father's judgment what would be right, and what provision should be made, and how it should be made, and the father did in fact make provision for his son, by will or otherwise, then the son was bound by the provision thus made, whether satisfactory or not, and could not recover in this appeal." The court did not so charge, but charged as follows: "If it was understood between them that the son was to render these services and to receive compensation therefor, and there was also an understanding between them that the compensation was to be made him by provision in his father's will, or without it, by which he was to get this estate, and if you find that the father did make a will, and paid him by the terms of the will, in the way in which it was understood by the son, at least, that he should be paid, then there can be no recovery in this case."

We think the court below erred in not charging the jury as requested by the defendant. The request was adapted to the facts which she had offered evidence to prove and claimed that she had proved; and had those facts been submitted to the jury and the jury had found them proved, we think the law is so that the plaintiff could not recover; and the jury should have been so instructed.

If *A* renders service for *B* under an agreement which leaves to *B* the right to determine the amount of compensation *A* shall receive, after the service shall have been ren-

dered, and how it shall be paid, and *B*, acting in good faith, so determines the compensation and mode of payment, *A* is as much bound by the determination as he would be if there had been an express agreement between the parties that he should receive that compensation and in that mode before the service was rendered, and if payment should be in fact made to that amount and in that mode *A*'s claim would be extinguished. This is in substance the case which the defendant asked the court to present to the jury.

The plaintiff claims that the court substantially complied with the request. We do not so understand the charge. The charge applies to a contract, the terms of which in regard to the son's compensation were understood between the father and son, and related to the father's estate, which was to be conveyed to the son by his father's will or in some other manner. The language is as follows:—"And there was also an understanding between them (the father and son) that such compensation was to be made the son by provision in his father's will, or without it, by which he was to get this estate; and if you further find that the father did make a will and paid him by the terms of the will in the way it was understood," &c. It is obvious that there is a substantial difference between the request and the charge of the court. In the request the compensation of the son and the mode of payment are left wholly to the father to determine. In the charge they are regarded as both agreed upon between the father and son. Surely there is an important distinction here.

It is further claimed that the request is indefinite, uncertain and ambiguous, inasmuch as it says—"If the son performed services, &c., under a *general expectation* that his father would make it right," &c., and that therefore the defendant was not entitled to the charge requested. It seems to us clear what was intended by the expression "general expectation." It was an expectation that arose from no express understanding between the father and son in relation to the son's compensation for his services, but

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grew out of all the circumstances of the case. We think this objection is not well taken.

There is error in the judgment appealed from, and a new trial is ordered.

In this opinion the other judges concurred.

53	367
59	404
53	367
66	223
53	367
70	319
53	367
76	67

 THE TOWN OF SUFFIELD vs. THE NEW HAVEN &
NORTHAMPTON COMPANY.

The act of 1884, (Session Laws, 1884, ch. 100,) provides that the railroad commissioners, when public safety requires an alteration of any highway crossed at grade by a railroad, "may order such alterations in such highway as they shall deem best." Two converging highways crossed a railroad at grade at points half a mile apart and united just beyond the road. Held that the commissioners had power to join the two highways before reaching the railroad and make a single crossing, although the distance by one highway was increased thirty rods and by the other fifteen rods.

While the commissioners have authority to make such alterations as they think best, yet their action is open to review upon the question whether, considering all the circumstances, it comes within the statute.

[Argued October 13th—decided December 14th, 1885.]

SUIT for an injunction against the closing up of parts of two highways; brought to the Superior Court in Hartford County, and reserved, on a demurrer to the defendant's answer, for the advice of this court. The case is fully stated in the opinion.

C. E. Perkins, for the plaintiff.

W. C. Case, for the defendant.

PARK, C. J. In the town of Suffield the defendant's railroad runs nearly north and south. Before the commencement of these proceedings there were two highways

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running in an easterly direction in that town, that crossed the railroad at grade about a half mile apart, and united in one highway within a short distance from the railroad on the east side, and at a point nearly equi-distant from the crossings.

The railroad commissioners, on a hearing duly had on the subject, ordered that the location of the two highways at the crossings be so changed that they would meet on the west side of, and just before reaching the railroad, and thus save the necessity of more than one crossing of the railroad.

The sole question in the case is, whether the commissioners had authority to make this order. All their authority came from the statutes of 1876 and 1884, (Session Laws 1876, p. 102; of 1884, p. 378;) and the case depends upon the construction to be given to these statutes.

The statute of 1876 is as follows:—"The selectmen of any town within which a highway crosses or is crossed by a railroad, or the directors of any railroad company whose road crosses or is crossed by a highway, may bring their petition in writing to the railroad commissioners, therein alleging that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the railroad or highway, or the removal of obstructions to the sight at such crossing, and praying that the same be ordered. Whereupon the railroad commissioners shall appoint a time and place for hearing the petition, and shall give such notice thereof as they shall judge reasonable to said selectmen, the railroad company, and the owners of the land adjoining such crossing; and after such notice and hearing said commissioners shall determine what alterations or removals shall be made, by whom done, and at whose expense."

The statute of 1884 is as follows:—"The railroad commissioners may, when in their opinion public safety requires an alteration of any highway crossed at grade by a railroad, after a hearing had upon such notice as they shall deem reasonable to the railroad company owning or operating said railroad, and to the selectmen of the town, mayor of

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the city, or warden of the borough, within which said highway is situated, and to the owners of the land adjoining said crossing, order such alterations in such highway as they shall deem best, and shall determine and direct by whom such alterations shall be made, at whose expense, and within what time; provided that in no case shall more than one half the expense be paid by the town, city or borough aforesaid; and provided further, that such alterations as are made at the primary instance of the railroad commissioners shall not be ordered at the rate of more than one a year on any one railroad, except in the case of railroads now having a double track throughout their entire length. Railroad companies may take land for the purposes of this section in the manner now provided by law for the taking of land by railroad companies."

These statutes differ but little except in the mode of procedure. One requires a petition to be brought by the selectmen of the town in which the proposed alterations are to be made, or by the directors of the railroad company; and in the other the commissioners can proceed upon their own motion.

We will consider the case under the statute of 1884, inasmuch as that statute is particularly referred to in the defendant's answer, and has been the one mainly discussed in the argument.

This statute confers upon the commissioners the power to "order such alterations in such highway as they shall deem best," &c. This power seems to be amply sufficient for all the demands of this case. These highways, for all highway purposes, remain substantially the same as they were before the alterations were made, the only difference being that a traveler upon one of them will have to go about fifteen rods and upon the other about thirty rods further than before. To compensate for this difference the traveler will escape the danger arising from two railroad crossings at grade. The accommodation of the public is manifestly greater than it was before, and were it not for the expense

attending the alteration we should hear no complaint made in regard to it.

But it is said that the power conferred upon the commissioners is limited by the word "alterations," which indicates it is said some slight change in the grade of the highway, or perhaps turning the road a little to the right or left, taking care that the change shall be inconsiderable.

In construing this statute we should take into consideration the object the legislature had in view in passing it, which was to prevent the destruction of life and property at highway crossings of railroads at grade, so far as it could reasonably be done. Such disasters have been occurring ever since railroads have had an existence, and the legislature, year after year, has been passing enactments on the subject to prevent the evil, but each act failed to accomplish the object, when in 1884 the legislature resorted to vigorous measures to prevent such calamities and made provision for the gradual entire removal of such crossings. They struck at the root of the evil and said to the commissioners, make such alterations of highways at their crossings of railroads at grade as you shall "deem best." "Such alterations as they shall deem best" is the language used.

The counsel for the plaintiffs seems to overlook all in this clause except the word "alterations," and treats that word, disconnected from the others, as alone descriptive of the power conferred, whereas all the other words are used to indicate the character of the alterations that may be ordered. The commissioners may not only order "alterations," but "such alterations as they shall deem best." Surely the language used is ample to cover the case. We do not mean to be understood that this language gives the commissioners unlimited power on the subject. They must act reasonably, and make such alterations only as the exigencies of each particular case seem reasonably to require. Their acts are open to review as to whether they come within the statute or not, taking into consideration all the circumstances of each particular case, including the expense involved. All that we mean to determine is that the altera-

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tions ordered in this extraordinary case come within the provisions of the statute. The commissioners found here a state of things that no man or set of men would ever think of creating. No one would entertain the thought for a moment of laying out two highway crossings of a railroad at grade, within one half mile of each other, and then run the two ways together immediately after passing the railroad, thus making uselessly and needlessly more than one crossing of the railroad. All that the commissioners did in effect was to order a removal of the forks of the main road from one side of the railroad to the other, and substantially abolishing both of the crossings by making the highway pass under the railroad and leaving the highways, for all highway purposes, substantially the same as before.

We advise the Superior Court that the answer is sufficient.

In this opinion the other judges concurred.

EDWIN P. GRISWOLD, ADMINISTRATOR, *vs.* THE NEW
YORK & NEW ENGLAND RAILROAD COMPANY.

58	871
74	846
58	371
77	354

A boy of sixteen was employed by the keeper of a restaurant at a station on the defendant's railroad to sell sandwiches and fruits on the trains, and had a free pass for the purpose over the whole road, the pass containing a condition that the company should not be liable for any personal injury caused by the negligence of its agents. The boy for a private purpose was going over a part of the road to which he was not called by his business, and while there was killed by a collision caused by the gross negligence of the defendant's servants. The company had no interest in the restaurant and had assumed no obligation to carry the boy over the road, but was incidentally benefited by the accommodation to its passengers, and to induce the keeper to establish it there had promised to aid him in every way it could, and gave the boy the pass as a means of aiding him. Held—

1. That the pass was to be regarded as given gratuitously and not upon consideration.
2. That the condition in such a pass as to the company's exemption from liability for the negligence of its servants, was not forbidden by public policy and was obligatory upon the passenger.

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8. That the boy, having capacity to accept the free pass, took it with the condition, and was as much bound by it as an adult.

A condition exempting a railroad company from liability for the negligence of its servants, is not void as against public policy by reason of a moral culpability involved. The company itself may be without actual fault in the matter.

Such a condition would not be good in the case of a passenger for hire.

A passenger on a free pass given for a valuable consideration has the same rights as a passenger for hire.

[Argued October 14th—decided December 14th, 1885.]

ACTION by the plaintiff as administrator of the estate of Charles P. Griswold, for an injury to the intestate by the negligence of the defendant, a railroad company, which caused his death; brought to the Superior Court in Hartford County. The defendant demurred to the complaint, the demurrer was overruled, and the case heard in damages before *Andrews, J.* The following facts were found by the court:

The defendant is a common carrier of passengers by railway, having a railroad, the western division of which is a single track extending from Hartford through the towns of Plainville, Bristol, Waterbury, and other towns, to the Hudson river. In 1883 Elliot Holbrook was the defendant's superintendent of this western division. In July, 1883, a collision took place between a passenger train moving easterly and a construction train moving westerly on the defendant's track, at a point from one half to three-fourths of a mile easterly of the station at Plainville. Charles P. Griswold was a passenger on the passenger train, and by the collision was killed, almost instantly. The collision was caused by the gross negligence of the defendant's servants. The passenger train consisted of an engine, a baggage-car, and two passenger coaches. The engine and the baggage-car were entirely wrecked. No person in either passenger coach was injured. The baggage-car was used, one part for baggage and the other for express matter. At the time of the collision Griswold was in the baggage-car talking with the express messenger. He was riding upon the pass hereinafter mentioned.

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Sometime in February, 1883, Mr. Holbrook proposed to one Chickering to open a lunch-room in the defendant's station-house at Waterbury, and such negotiation was had between them that the defendant fitted up a lunch-counter in the station-house, and Chickering went there to keep it. A good lunch-room at important stations is an advantage to a railroad doing a passenger traffic. Chickering was an experienced and successful man in such business, had previously kept a lunch-room in the defendant's station-house at Putnam, and Mr. Holbrook was quite desirous that he should open a like room at some station on the western division of the road, and, to induce him to come, promised to aid him in every way that he could. At the time there was no agreement as to how much rent Chickering should pay. He went there on trial, to see whether or not he could make the business successful.

In April, 1883, Chickering hired Griswold, who was then a well-grown and intelligent lad, sixteen-and-a-half years old, to distribute small hand-bills advertising his lunch-counter, and to sell fruits, sandwiches, and other like articles, upon all the trains coming into Waterbury; and soon thereafter he applied to Mr. Holbrook for a pass for Griswold to ride upon such trains, saying to him that it would be of great advantage to him, Chickering, to have Griswold travel upon the trains for that purpose. In a few days Chickering received from Holbrook the pass, which he delivered to Griswold. Griswold continued in the employment of Chickering up to the time of his death, and at all times had possession of the pass. The pass was, at a subsequent date, renewed. This was done at the request of Chickering. The pass was as follows:

NEW YORK AND NEW ENGLAND RAILROAD.

PASS *Chas. P. Griswold, account Waterbury Restaurant,*
Between all points on Western Division,
Until June 4, 1883, unless otherwise ordered.

No. 3001.

S. M. FELTON, JR.

General Manager.

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[Reverse.]

Good until September 1, 1883.

S. M. FELTON, JR.,
General Manager.

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The person accepting this ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or any loss or damage to the property of the passenger using this ticket.

If presented by any other than the person named thereon, conductor will take up the ticket and collect fare.

Griswold's employment did not require him to travel as far eastward as Plainville. His mother lived at Plainville, and he was accustomed to go home to her house each week to stay over Sunday, and at other times as there was occasion, riding both ways on the pass. He did this by Chickering's permission and with the knowledge of the defendant's officers. Upon the day that he was killed Griswold had gone from Waterbury to Plainville to have his mother attend to his clothes, intending to return to Waterbury in the evening. The day previous there had been a serious collision on the defendant's road at Clayton, a station next easterly from Plainville, the wreck of which was still strewn along the track. While waiting for his clothes Griswold thought he would go to Clayton and see the wreck, and was on the train for that purpose. Just after the train had started from Plainville the conductor saw Griswold standing on the forward platform of the forward passenger coach. He was well acquainted with him, knew he had the pass, and did not ask him for any fare.

There was at the time a rule of the defendant that the conductor should not allow any passenger to ride in the baggage-car. This rule was not generally published, but was made for the guidance of the conductor. Griswold had no knowledge of it.

Griswold was a friend of the express messenger, and had been in the habit, in the intervals of his employment, of riding in the baggage-car with him. The conductor of the

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train did not know that Griswold was in the baggage-car at the time, and there was no evidence, other than the fact of such habit, to show that he had ever had knowledge that he was accustomed so to ride.

Griswold was himself guilty of no contributory negligence, unless the law itself imputes such negligence to him from his riding in the baggage-car under the circumstances above stated.

Upon these facts the defendant claimed that the plaintiff was entitled to recover no more than nominal damages, and asked the court so to decide. The court did not so decide, but rendered judgment for the plaintiff for fifteen hundred dollars damages. The defendant appealed.

S. E. Baldwin and *E. D. Robbins*, for the appellant.

1. The negligence of the boy contributed to the injury. He would not have been hurt if he had been in one of the passenger cars. He was of sufficient age to be able to act intelligently in the matter. *Neal v. Gillett*, 23 Conn., 442; *Nagle v. Allegheny Valley R. R. Co.*, 88 Penn. St., 35. The baggage-car is an unsafe place to ride in. *Pennsylvania R. R. Co. v. Langdon*, 92 Penn. St., 27. The Supreme Court of Massachusetts, in *Hickey v. Boston & Lowell R. R. Co.*, 14 Allen, 431, says: "If sufficient and suitable provision be made within the cars for all the passengers, the managers of the train are not under obligations to restrict them to their proper places, nor to prevent them from acts of imprudence. If they voluntarily take exposed positions with no occasion therefor, nor inducement thereto, except a bare license by non-interference or express permission of the conductor, they take the special risks of this position on themselves." The Supreme Court of Pennsylvania, in *Penn. R. R. Co. v. Langdon*, above cited, says: "If it is once understood that a man who rides in a baggage-car in violation of the rules, does so at his own risk, we shall have fewer accidents of this description." The law itself, then, imputes to a traveler this unnecessary venturing out of the coaches into the baggage-car as a neglect of duty, such that,

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if essentially contributing to cause the injury received by him, it debars him from recovery of damages therefor. *Kentucky Central R. R. Co. v. Thomas*, 79 Ky., 160; *Houston &c. R. R. Co. v. Clemmons*, 55 Texas, 88; *Peoria &c. R. R. Co. v. Lane*, 83 Ill., 448; *Eaton v. Del., Lack. & Western R. R. Co.*, 57 N. York, 382, 388, 397. It is true that the boy "had been in the habit, in the intervals of his employment, of riding in the baggage-car," but no knowledge of such habit was brought home to the defendant or its officers. Even if the conductor had invited him into the baggage-car, it is not clear that such an invitation would be chargeable to the defendant, which had expressly prohibited its conductors from allowing passengers there. *Railroad Co. v. Jones*, 95 U. S. R., 439, 443; *Hickey v. Boston & Lowell R. R. Co.*, 14 Allen, 429.

2. As to the free pass. Griswold was abusing his privilege in riding on his pass from Plainville to Clayton. It was issued for use in his employment. His stretching it to cover journeys from his place of employment to his home had been acquiesced in, but it was a long step beyond that to use it for an excursion to view a railroad wreck. If, on the other hand, he had, as the plaintiff claims, a right to so use his free pass, he was on this train under a license on condition. The condition was that there should be no claim for any injuries he might receive through any negligence of the defendant's servants. His injuries were due to such negligence combining with his own. It has never been alleged, or suggested, that the defendant or its officers were in any wise in fault. It was, in fact, one of those cases of gross negligence—of momentarily complete lapse of attention on the part of an ordinarily careful servant, the occasional occurrence of which a railroad management cannot prevent or guard against. Under the circumstances found, and where it is not shown that the defendant or its officers (as distinguished from its mere subordinate servants) were in some degree to blame, the defendant cannot be subjected to liability. *Gardner v. N. Haven & Northampton Co.*, 51 Conn., 150; *Kinney v. Central R. R. Co.*, 32 N. Jer. Law,

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408; *S. C.*, 84 id., 513; *Wells v. N. York Central R. R. Co.*, 24 N. York, 185; *Bissell v. N. York Central R. R. Co.*, 25 id., 442; *Poucher v. N. York Central R. R. Co.*, 49 id., 263; *McCawley v. Furness Ry. Co.*, L. R., 8 Q. B., 57; *Gallin v. London & N. Western Ry. Co.*, 10 id., 212; *Hall v. N. Eastern Ry. Co.*, id., 437. Even the Supreme Court of the United States (which has disapproved the views of the New York courts in the case of some passes, as for example drovers' passes, which it holds are given for a consideration, (*Railroad Co. v. Lockwood*, 17 Wall., 357), has refused to hold that a condition like the one now in question is not binding where the carriage of a person is really gratuitous. *Railroad Co. v. Stevens*, 95 U. S. R., 658. But it is claimed by the plaintiff that the defense here made is bad, because the contract of an infant is not binding. The contract of an infant however is often available as a defense to a claim made in his behalf, though it would not support an action against him by the other party for affirmative relief. 1 Parsons on Cont., 315, note l. But in looking at the matter in this light we obscure the true nature of the transaction. There is no law that a minor may not accept a free gift on a reasonable condition as to the quantity of the gift, or with a proper stipulation that the gift shall not include something which otherwise might be considered as going with it. It should be noted that in this case the free pass to Griswold was given as a favor to Chickering and not under any contract duty to anybody. A case in other respects quite similar to the present was recently before the Canadian courts. Alexander, a newsboy on the defendant's railroad, was injured while prosecuting his business, and died within a year. He was in the employ of a news firm which was bound to the railroad company by a contract providing as follows:—"That the railroad company should carry said firm, their agents and newsboys, and should not be liable or responsible for any injury to the person, whether such accident should be occasioned by the willful default of the defendant or any one of its servants, or any cause whatever." The boy's administrator brought

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suit for damages for his death, and the defendant pleaded this agreement in bar. The plaintiff demurred, and the plea was held good, the court using the following language: "If any presumptions arise it would seem that the plaintiff's son should have known the terms of the contract. If he wished to protect himself, he should have stipulated with his employer that he would not become a passenger on the terms of the contract. * * * If the contract is to be considered as one made with the passenger himself, though travelling on an agreement made with his employer, and that such passenger agreed to release the railroad company from all claims for accident, as a substantive agreement of his own, then the railroad company can never carry an infant nor property of an infant at the diminished fares on which other persons and property may pass over the lines." *Alexander v. Toronto & Nippissing Ry. Co.*, 33 U. Canada, Q. B., 474.

3. The demurrer was well taken. The want of averments as to widow and heirs is fatal. The plaintiff shows no claim of action for the estate of the intestate. If he has any it is for the widow or heirs, and it does not appear that there were any. The first ground of the demurrer was therefore good. *Andrews v. Hartford & N. Haven R. R. Co.*, 34 Conn., 58. The complaint does not, as the Practice Act requires, "contain a statement of the facts constituting the cause of action." It is a statutory action, unknown to the common law, and all the conditions of the statute should be met in pleading. The legislature were not trying to protect the creditors of the party killed, or his estate generally, or even his devisees and legatees, if he died testate, but solely his widow and heirs. *Safford v. Drew*, 3 Duer, 627; *Chicago & Rock Island R. R. Co. v. Morris*, 26 Ill., 400; *Ind.*, *Pittsb. & Cleveland R. R. Co. v. Keeley's Admr.*, 23 Ind., 133.

W. C. Case and *P. S. Bryant*, for the appellee.

1. As to contributory negligence by riding in the baggage car. In the first place, this question of contributory negligence was one of fact to be decided in the court

below. *Beers v. Housatonic R. R. Co.*, 19 Conn., 566; *Park v. O'Brien*, 23 id., 339; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 id., 284. The court below did decide this question by giving the plaintiff substantial damages, saying the deceased "was guilty of no contributory negligence unless the law imputes such negligence to him." It is very clear from all the authorities that riding in a baggage-car simply is not in law contributory negligence—that negligence will not be imputed to the passenger who occupies a car which the railroad company furnishes and permits him to enter for his journey. *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn., 125; *Ohio & Miss. R. R. Co. v. Muhling*, 30 Ill., 9; *Carroll v. N. York & N. Haven R. R. Co.*, 1 Duer, 571; *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Penn. St., 239; *Creed v. Penn. R. R. Co.*, 86 id., 140; *Edgerton v. N. York & Harlem R. R. Co.*, 35 Barb., 389; *Dunn v. Grand Trunk R. R. Co.*, 58 Maine, 187; *Pool v. Chicago, Mil. & St. Paul Ry. Co.*, 53 Wis., 658; 2 Redf. Ry. Cases, 485, *note*. Negligence is a relative term, and whether it shall be predicated of any given act depends entirely upon the circumstances. What were the circumstances of this act? The passenger was a boy sixteen and a half years old. For three months he had been riding constantly on the defendant's passenger trains, scattering handbills and selling fruit for a railroad restaurant. The intervals of his employment he customarily spent in the baggage car. He never saw any notice forbidding his presence there; there never was one. The conductor, who knew him well, allowed him to ride where he pleased. His occupation gave him practically the freedom of the train. It practically placed him among the employees of the train, and he habitually sought their society where it was to be had, in the baggage car. All this for three months without warning or remonstrance from any servant of the defendant. If the baggage car was a place of great danger, why was he not informed of it and excluded by the defendant, whose duty it was to furnish its passengers diligent protection? But there is another answer to this claim of contributory

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negligence. The negligence of the defendant was "gross negligence." The court below so finds. The act of the deceased in entering the baggage car, whether negligent or not, will not excuse gross negligence in the defendant. Even if he were a trespasser the company would not be absolved from the consequences of treating him with gross negligence. *Carroll v. N. York & N. Haven R. R. Co.*, 1 Duer, 571; *Watson v. Northern Ry. Co.*, 24 Up. Can., 98; *Isbell v. N. York & N. Haven R. R. Co.*, 27 Conn., 404; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 id., 297.

2. As to the deceased riding on a free pass. In the first place, was it a free pass? Was the permission to ride an absolute gratuity, or a permission given in pursuance of an agreement based upon some consideration which had been or was to be given on the one side and received upon the other? The pass was given under the following circumstances: Holbrook, the defendant's superintendent, acting within the scope of his authority and for the interest of his principal, entered into negotiation with Chickering to open a lunch-room in the defendant's station at Waterbury. To induce him to do this Holbrook "promised to aid him in every way that he could." It was purely a matter of business with Holbrook, and his promises were made in his capacity of railroad manager and for the pecuniary benefit of the company. Relying upon his promised aid Chickering came to Waterbury and started the lunch-room, and soon applied to Holbrook for performance of his promise by asking for a pass for his hired boy, upon the ground that it would be a great advantage to him in his business. And Holbrook gave him the pass (not as a gratuity; he had no right to make gratuities,) but in fulfillment of his promise, for which the company had already received a consideration in his coming to Waterbury. It would seem to be clear that the pass was asked and granted, not as a favor, but in the course of business, as a stipulated right which had been earned and was due. But if the pass was thus paid for what becomes of the claim of exemption from liability under its conditions? The sole foundation of this claim is

that the pass is strictly a gratuity, and the person using it not in any sense a passenger for hire. It is said that the company may attach such condition to its gift as it pleases, and the condition will be binding. But if the pass is not a gratuity, and the passenger is a passenger for hire, the claim falls to the ground. It is not necessary that a passenger's fare should be paid in money to constitute him a passenger for hire. If the company receives any benefit in connection with his passage, or the journey is pursuant to any business negotiation between the passenger and the company, the permission to ride is not a gratuity in the law, whether the written evidence of the permission be a ticket or a pass with conditions. *Railroad Co. v. Lockwood*, 17 Wall., 357. This was a case arising upon a "drover's pass," and BRADLEY, J., says:—"It may be assumed *in limine* that the case was one of carriage for hire; for, though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle." The owner of a patented car-coupling, for the adoption of which by a railway company he was negotiating, went, at the expense and request of the company, to a point on its road to see one of its officers in relation to the matter. A free pass was furnished by the company. During the passage the car in which he was riding was thrown from the track by reason of the defective condition of the rails and he was injured. It was held—1st. That the pass was given for a consideration, and that he was a passenger for hire; 2d. That being such, his acceptance of the pass did not estop him from showing that he was not subject to the conditions printed on the back of the pass, exempting the company from liability for any injury he might receive by the negligence of the agents of the company or otherwise. *Railroad Co. v. Stevens*, 95 U. S. R., 655. BRADLEY, J., who delivered the opinion, says (p. 658:)—"The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor gratuity in any sense. It was by virtue of an agreement in which the mutual interest of the parties was consulted.

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* * * The pass was a mere ticket or voucher, to be shown to the conductors of the train as evidence of his right to be transported thereon. It was not evidence of any contract by which the plaintiff was to assume all the risk, and it would not have been valid if it had been." The foundation of these cases is the doctrine that a contract of a common carrier stipulating for exemption from responsibility for negligence is contrary to public policy and void—a doctrine fully sanctioned by this court. *Welch v. Boston & Albany R. R. Co.*, 41 Conn., 342. The court there say:—"We cannot recognize the validity of an agreement to exempt a party from all liability where he fails to exercise ordinary care and diligence in the business in which he engages." And do not the same considerations of public policy govern, whether the passenger be one for hire, a gratuitous passenger, or a passenger on a pass exempting the company from liability? It is true that *Railroad Co. v. Lockwood* was stated by Judge BRADLEY to cover only the case of passengers for hire, but the later case of *Railroad Co. v. Stevens* clearly intimates the applicability of the doctrine whether the passenger be one for hire or on a free pass; and in the case of *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn., 125, the court used the following language:—"Whether the case be one of a passenger for hire, a merely gratuitous passenger, or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen, is obviously the same. Sound public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed though the passenger be gratuitous, or as in this case riding upon a conditioned free pass." When a contract is declared void as against public policy, it is so declared, not in the interest of either of the parties, but in the interest of the public; "the defense is allowed, not for the sake of the defendant, but for the sake of the law itself." *Oscanyan v. Arms Co.*, 103 U. S. R., 268. But whether the contract of exemption from liability upon a conditioned pass is ever valid and binding or not, it certainly is not in the present case, because the

deceased at the time of accepting and using the pass in question was a minor, and incapable of making the agreement relied upon by the defendant. The pass was given to the boy, the alleged contract of exemption from liability was made with him, and no other agreement exempting the company from the consequences of negligence in transporting him is claimed. The deceased was legally incapable of making the contract claimed; legally incapable of assenting to the terms and conditions of the pass; legally incapable of agreeing to any limitations upon the gift of the company; and for this reason, if for no other, there is nothing in that part of the defense which stands upon the free pass.

3. The complaint is sufficient. The statute (Acts of 1877, p. 191), gives the administrator a right to recover just damages not exceeding \$5,000. The question who is to have the money after it is recovered has nothing to do with the cause of action. Gen. Stat., 442, sec. 9. The cause of action is the injury to the person of the deceased, and exists before the death. It does not accrue after his death for his widow and children. *Murphy v. N. York & N. Haven R. R. Co.*, 29 Conn., 496; *Lamphear v. Buckingham*, 33 id., 237.

LOOMIS, J. The plaintiff's intestate, Charles P. Griswold, was a boy about seventeen, employed by the keeper of a restaurant at the defendant's station in Waterbury to sell sandwiches, fruits, &c., on all trains coming into Waterbury, having a free pass for that purpose between Hartford and Fishkill. His employment did not require him to travel as far east as Plainville, but his mother lived there, and he often went there to visit her. In July, 1883, he was at Plainville for this purpose, and boarded a train bound thence for Hartford in order to stop off at Clayton and look at the wreck of a train there, caused by a collision the day before. The train had two passenger cars, and the conductor saw him on one of them just after the train started, but afterwards, without the conductor's knowledge, he went into the baggage car, and while there a collision

occurred with another train coming westerly (there being but a single track) which wrecked the engine and baggage car and killed the intestate. He was at the time riding on a free pass which provided that the person accepting it assumed all risk of accident, and expressly stipulated that the company should not be liable under any circumstances, whether of negligence of their agents or otherwise, for any personal injury. The defense was placed on three independent grounds:—

1. The complaint was demurred to upon the ground that the action was brought for the sole benefit of the estate of the intestate, when it should have been for the benefit of the widow or heirs;
2. That the intestate was guilty of such contributory negligence as would prevent recovery; and
3. That at the time of the injury he was traveling on the defendant's train without the payment of any fare, under an agreement or condition expressly assuming all risk of accident and stipulating that the defendant should not be liable in any event for injuries resulting from the negligence of its servants or otherwise.

As our views of the last question will be decisive of the whole case we will confine our discussion to that, and waive the other two questions.

Before we come to the discussion of the question whether under the conditions of the pass the law will protect the defendant from liability, it will be necessary to determine whether the pass was gratuitous or upon consideration; for if the latter is true, the defendants must be held to their full responsibility as carriers of passengers. The plaintiff contends that the pass was part of the consideration to induce Chickering to open a lunch-room in the defendants' station at Waterbury, but the finding is silent in regard to this, and we are not justified in assuming that it was an element in the negotiations or was in the mind of either party. It was on the other hand obviously an after-thought, and when asked for by Chickering he did not refer to it as a thing promised by Holbrook or any one on behalf

of the company. It was not claimed as matter of right under any contract duty, but merely as matter of favor, and as such we must hold it to have been granted.

The question of consideration should be determined as in any other case of contract. The existence of some selfish motive (if any) impelling the act renders it none the less a gratuity in the eye of the law if there was no obligation at all to furnish the pass. The restaurant business belonged exclusively to Chickering, whatever may have been the incidental benefits to the railroad company.

And besides, it is to be observed that at the time of the injury the intestate was not traveling at all in the interest of the restaurant, but solely to gratify a personal curiosity which could by no possibility be any benefit direct or indirect to the railroad company. So that on the whole we have no hesitation in calling his pass a pure gratuity.

We have then a case where the defendant gave a free pass upon the express condition that the passenger would make no claim for damages on account of any personal injury received while using the pass, in consequence of the negligence of the defendant's servants. But the plaintiff, as the personal representative of the one receiving the pass, has instituted a suit in direct violation of the condition. In ordinary transactions such a breach of good faith, to say nothing of the breach of contract, would be disgraceful, but there may be great considerations of public policy which will conceal the private features of the transaction and make the stipulation invalid in the eye of the law.

By the English decisions it is clear that the carrier has full power to provide by contract against all liability for negligence in such cases. *McCawley v. Furness Railway Co.*, L. R., 8 Queen's Bench, 57; *Hall v. N. Eastern Railway Co.*, id., 437; *Duff v. Great Northern Railway Co.*, L. R., Ireland, 4 Com. Law, 178; *Alexander v. Toronto & Nipissing Ry. Co.*, 33 Upper Canada, 474. This last case is almost identical with the one at bar.

In the United States we find much contrariety of opinion. Some state courts of the highest authority follow the

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English decisions and allow railroad companies in consideration of free passage to contract for exemption from all liability for negligence of every degree, provided the exemption is clearly and explicitly stated. *Wells v. N. Y. Central R. R. Co.*, 26 Barb., 641, and same case, 24 N. York, 181; *Perkins v. N. Y. Central R. R. Co.*, id., 208; *Bissell v. N. Y. Central R. R. Co.*, 25 id., 442; *Poucher v. N. Y. Central R. R. Co.*, 49 id., 263; *Magnin v. Dinmore*, 56 id., 168; *Dorr v. N. Jersey Steam Nav. Co.*, 1 Kernan, 485; *Kinney v. Central R. R. Co.*, 32 N. Jer. Law, 409, and 34 id., 513; *Western & Atlantic R. R. Co. v. Bishop*, 50 Geo., 465.

Other courts, also of high authority, concede the right to make such exemption in all cases of ordinary negligence, but refuse to apply the principle to cases of gross negligence. *Ill. Central R. R. Co. v. Read*, 37 Ill., 484; *Ind. Central R. R. Co. v. Mundy*, 21 Ind., 48; *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn., 125. And other state courts of equal authority utterly deny the power to make a valid contract exempting the carrier from liability for any degree of negligence. *Cleveland, &c., R. R. Co. v. Curran*, 19 Ohio St., 1; *Mobile & Ohio R. R. Co. v. Hopkins*, 41 Ala., 486; *Penn. R. R. Co. v. Henderson*, 51 Penn. St., 315; *Flinn v. Phila., Wilmington & Balt. R. R. Co.*, 1 Houst. (Del.), 469.

The Supreme Court of the United States in *Railroad Company v. Lockwood*, 17 Wall., 357, where a drover had a free pass to accompany his cattle on their transportation, held, in opposition to the New York and English cases, that the pass was not gratuitous because given as one of the terms for carrying the cattle for which he paid. The reasoning of BRADLEY, J., was directed so strongly to the disparagement of the New York decisions that it might have indicated an opposition to the principle of those cases in other respects, had not the opinion concluded with this distinct disclaimer:—"We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passen-

ger instead of a passenger for hire." The reasoning and the conclusions of the court therefore must be considered as all based on the assumption that the passenger paid for his passage. The conclusions of the court were:—"1. That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law. 2. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants."

We are not disposed to attempt to controvert the soundness of these propositions as applicable to passengers for hire, but it remains an open question what is reasonable in the case of a free passenger? Will a just sense of public policy allow any distinction? It seems to us the two cases cannot be identical in the eye of the law or of public policy, but that there is ample ground for a distinction.

In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and therefore the stipulated exemption is no abdication of that rigid responsibility which the law imposes on common carriers. The gratuitous accommodation concerns only the immediate parties, unless in a very indirect way, by making the fare of other passengers higher. If, however, fares are unreasonable, they may be subject to governmental regulation. But it will suffice to say that the remote and indirect effect alluded to cannot make the exemption void on the ground of public policy. Many other gratuities and charities might be named, which, though conceded to be commendable, would have a similar effect.

Again in *Railroad Company v. Lockwood*, and in other cases advocating the same doctrine, one prominent reason given for holding the contract void as opposed to public policy is, that in making the contract the carrier and his customer do not stand on a footing of equality; that the latter is only one individual against a powerful corporation, which has him in its power, and that he cannot afford to

higgle in regard to terms. It is manifest that this reasoning has no application at all to a free passenger. If his position is not superior, it is at least equal, to that of the railroad company. The latter will not often be found urging the acceptance of free passes. There is no possibility of any higgling on the part of the passenger for more favorable terms, and the solicitation for the pass itself will come from the latter also. Under these circumstances it does not seem reasonable to add to a free gift of transportation the burden of insuring the passenger against all personal injuries arising from the negligence of the carrier's servants, the risk being well known and willingly assumed by the passenger as the condition upon which the gift is made.

But it may be suggested that there is involved in negligence, especially where the safety of life is concerned, a moral as well as legal culpability, which renders such contracts of exemption void as against public policy. But those who regard this argument as decisive must, it seems to us, overlook the fact that there may be and very often is negligence that would be called gross on the part of servants, for which there is no moral culpability at all on the part of the master. The parties contracting for the exemption under consideration well know that railroad passengers are continually exposed to risks arising from some momentary lapse of memory or attention on the part of servants, who have gained a high reputation for skill, prudence and carefulness, and who were, it may be, selected on that account. A large percentage of accidents will be found to have resulted in the way suggested without any actual fault on the part of the officers of the corporation. Now the finding in the case at bar is explicit that the injury to the plaintiff's intestate resulted from the gross negligence of the defendant's servants. This restriction is exclusive, and is to be understood as used in contradistinction to negligence on the part of the corporation itself through the acts of those who properly represent it.

By the rule of *respondeat superior* a corporation is made liable for the negligence of its servants, but where the princi-

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pal has done the best he could the rule is technical, harsh, and without any basis of inherent justice. As applicable ordinarily to corporations it is of great practical convenience and utility. We do not therefore advocate its abolition, but we contend that, in a case like the present, where there is no actual fault on the part of the principal, it is "reasonable in the eye of the law" that the party for whose benefit the rule is given should be allowed to waive it in consideration of a free passage. It is not the case where a party stipulates for exemption from the legal consequences of his own negligence, but one where he merely stipulates against a liability for imputed negligence in regard to which there is no actual fault. It is easy to see, therefore, that considerations of public policy have no application to such a case.

Where a master uses due diligence in the selection of competent servants, and furnishes them with suitable means and machinery to perform the service in which he employs them, he is not answerable to one of them for an injury received in consequence of the negligence of a fellow servant, while both are engaged in the same service. Here the rule of *respondet superior* is waived, and it is generally put on the ground of implied contract, and if a waiver may be implied in such case why not give effect to an express agreement in the case of a free passenger?

The Roman law, with its clear sense of justice, made a distinction, similar to the one for which we contend, in determining the liability of the mandatory for the negligence of his agents. Where the business of the mandatory required the interposition of sub-agents he was liable for the negligence of such sub-agents only on the ground of *culpa in eligendo*, supposing that he knew or could have known their incompetency.

The foregoing reasoning, as it seems to us, will also furnish a complete answer to the claim that the defendant must be held liable on account of the gross negligence of its servants, for it is manifest that the principal is no more culpable in the one case than in the other; and the rule of

respondeat superior being waived, the protection is complete.

The word "negligence" in the stipulation for exemption, is used in its generic sense and comprehends all degrees. And we may add that some high modern authorities have expressed strong disapprobation of any attempt to fix degrees of diligence or negligence, because the distinction is too artificial and vague for clear definition or practical application. See the opinion of the court in *Railroad Company v. Lockwood* (supra), page 382, and cases referred to in a note on page 383.

The only remaining question to be considered is, whether the minority of the plaintiff's intestate, which rendered him incapable generally of making contracts, will render his assent to the limitation or condition of the pass void also.

But a minor has capacity in law to accept a free gift, either absolute or conditional. If the condition or limitation is reasonable, he cannot accept the gift and reject the condition or limitation, for that would enlarge the gift, which of course cannot be done without the consent of the donor. If the intestate did not like the gift as made he should have declined to accept it, and not attempt, as his personal representative is doing, to make it include in effect, contrary to its terms, an insurance against risks arising from the negligence of the defendant's servants.

There was error in the judgment complained of and it is reversed and the case remanded.

In this opinion the other judges concurred.

53	390
56	432

EDWARD WINSLOW AND OTHERS *vs.* INGRAM FLETCHER
AND OTHERS.

The defendants, residing in the state of Indiana and owning stock in a bank located there, lodged a certificate of the stock, with a blank power to sell and transfer it, with a corporation in this state as collateral security

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for a loan, its value being considerably in excess of the loan. Held that their equitable interest in the stock could not be reached by the process of foreign attachment in this state.

And that the stock could not be reached by ordinary attachment here.

[Argued October 15th, 1885—decided February 12th, 1886.]

ACTION to recover money due; brought to the Superior Court in Hartford County. The defendants resided in the state of Indiana, and service was made only by leaving a copy with the Connecticut Mutual Life Insurance Company as a garnishee. The defendants appeared only to plead to the jurisdiction. The court (*Andrews, J.*) found the facts, and rendered judgment for the defendants. The plaintiffs appealed. The case is fully stated in the opinion.

A. P. Hyde, for the appellants.

1. The shares of stock were "effects," within the meaning of that word as used in our statute with regard to foreign attachment. Webster's Dict., *in verbum*; *North v. Forest*, 15 Conn., 400; *Ayres v. French*, 41 id., 142; *N. Eng. Marine Ins. Co. v. Chandler*, 16 Mass., 275; *Smith v. Am. Coal Co.*, 7 Lansing, 317; *Bank v. Lanier*, 11 Wall., 369; *McAllister v. Kuhn*, 96 U. S. R., 87.

2. The shares were in the hands of the life insurance company as agent or trustee of the defendants. The defendants may have a shadow of title, but the real title is in the company. *N. Eng. Marine Ins. Co. v. Chandler*, 16 Mass., 275; *Cook v. Hallett*, 119 id., 148.

3. They were so concealed in the hands of the insurance company that they could be taken by foreign attachment. *Thompson v. Stewart*, 3 Conn., 183; *Treadway v. Andrews*, 20 id., 385; *Bridgeport Bank v. N. York & N. Haven R. R. Co.*, 30 id., 231; *N. Eng. Marine Ins. Co. v. Chandler*, 16 Mass., 275, 280; *Carty v. Fenstemaker*, 14 Ohio St., 457; *Burnham v. Doolittle*, 14 Nebr., 214; *Bank v. Lanier*, 11 Wall., 369, 377; *McAllister v. Kuhn*, 96 U. S. R., 87, 89; *Smith v. Amer. Coal Co.*, 7 Lansing, 317; *N. York & N. Haven R. R. Co. v. Schuyler*, 34 N. York, 30.

H. C. Robinson and *W. F. Henney*, for the appellees.

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CARPENTER, J. Complaint for a money demand, served only by process of foreign attachment. The plaintiffs and defendants are non-residents. No property was attached except that alleged to be in the hands of the garnishee. The defendants appear for the sole purpose of pleading to the jurisdiction.

The plea alleges that the plaintiffs are residents of the state of New York; that the defendants are residents of the state of Indiana; that no personal or other service of process has ever been made upon the defendants or any of them; that no service of the original process was ever made otherwise than upon the Connecticut Mutual Life Insurance Company, named therein as garnishee; that said garnishee was not indebted to the defendants or either of them, and had not, at the time of the service, any effects or estate of the defendants or either of them in its hands that could be attached or secured by the process of foreign attachment.

The reply denies that part of the plea which alleges no indebtedness by the garnishee and no estate in its hands. The finding shows that at the time of the service the defendants were indebted to the garnishee in the sum of two hundred thousand dollars, and that the garnishee held as collateral security therefor certificates of stock in the Indianapolis National Bank located in the state of Indiana, to the value of two hundred and forty thousand dollars, with a blank power to sell and transfer the same. This stock was transferable only on the books of the bank, and had not been transferred.

Upon these facts the Superior Court found the issue for the defendants and dismissed the complaint. The plaintiffs appealed.

The question is, whether the attachment will hold any surplus there may be in the bank stock after paying the defendants' indebtedness to the garnishee.

The case of the *Middletown Savings Bank v. Jarvis*, 33 Conn., 372, throws some light on this question. Jarvis pledged certain stock in the Middlesex Quarry Company to the savings bank to secure a loan. The stock was trans-

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ferred to and stood in the name of the bank. Rowland, a creditor of Jarvis, attached his equitable interest in the stock in the mode provided by statute for attaching stock and sold it on an execution, the officer transferring such interest to the purchaser. Jarvis afterwards assigned his interest in the stock to others. On a bill of interpleader brought by the bank, the attaching creditor held the stock subject to the lien of the bank. Counsel for the assignees claimed that Jarvis's interest in the stock could only be taken by a bill in equity or by the process of foreign attachment. Counsel for the attaching creditor contended, in an elaborate brief, that foreign attachment would not reach it. Of course the main question was, whether the stock was well attached. The court held that it was. Strictly speaking, the court had no occasion to say that it could not be attached by foreign attachment; but the court by MCCURDY, J., says:—"We do not see very well how the case comes within the provisions of the law of foreign attachment, but it certainly does come precisely under the statute to which we have referred."

Now if the stock in the present suit was the stock of a domestic corporation, that case is a precedent for holding that it might have been attached directly by the ordinary process. That being so, it was not subject to the law of foreign attachment, for it was not concealed. In its nature it was as incapable of concealment as real estate. It was at all times visible, accessible property, and open to attachment.

Does the fact that it is stock of a foreign corporation change the law in this respect? We think not. No good reason occurs to us why the rule should be different in the two cases. The stock in Indiana is just as accessible to these creditors as it would have been if located in this state. The statute law of Indiana provides for an attachment of stock. Rev. Statutes of Indiana, 1881, sec. 723. Section 931 makes the corporation liable as garnishee in respect to "any share or interest in" its stock. Legally there is no hardship in requiring them to go there, where in contempla-

tion of law the stock is situated, instead of coming here. By coming here they can only succeed upon the theory that the stock is in some sense located in this state. Such a theory is inconsistent with a familiar and well-settled rule, that stock in a corporation for the purposes of an attachment has its situs where the corporation is located. Again; if the insurance company held the stock in its own name simply as security for the debt, it would have held nothing that it could have been compelled to deliver to the officer to be seized and sold on an execution. There was no indebtedness that it could have been compelled to pay, because it was not owing the defendants. Whatever liability there was, hinged upon two contingencies—that the stock should be sold by the garnishee, and that it should bring enough to leave a surplus after paying its claim against the defendants. Surely such a liability is not subject to the law of foreign attachment. If the defendants redeem the stock, as they may, they will be entitled to an unconditional re-transfer of the stock to them. The obligation to re-convey is not a debt subject to a garnishee process. The only way in which a surplus in such a case can be reached, before it is ascertained and becomes a debt, is to attach the stock, as was done in the case of *Middletown Savings Bank v. Jarvis*, supra, subject to the pledge.

Thus far we have assumed that the title to the stock stands in the name of the garnishee. But it does not. That fact and one other, namely, that this is stock in a foreign corporation, distinguish this case from the case referred to. The distinction in both respects is unfavorable to the plaintiff. We think it is very clear that the insurance company was not indebted to the defendants. It had not become the owner of the bank stock or any part of it, and so was not indebted to the defendants for any surplus. No part of the stock had been sold; consequently nothing had been received to apply on the debt of the defendants, much less to pay over to the defendants. It will hardly do to say that the insurance company was the owner because it had control of the stock and had it in its power at any time to

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become the owner. There is a difference between the possession of property and the mere naked power to possess it. The power to possess it in this case was not to be exercised except in a certain contingency, and that contingency had not happened. The parties contemplated a permanent loan, to continue at their pleasure. Should the debtor desire to pay, or should the creditor require it, it was supposed that the money would be paid, and that the bank stock would never in fact be transferred or sold. The power of sale was given simply as a means of compelling payment. Manifestly it cannot be said in a legal sense that the creditor now owns the stock or owes for it. The law will not regard that as done which the parties under existing circumstances intended should not be done. The defendants for all practical purposes still own the stock. They alone can vote on it and receive the dividends. They have the substance, while the garnishee has but the possibility of a title.

The only other ground on which the garnishee can be held is, that it has the goods and effects of the defendants in its hands so concealed that they cannot be attached by ordinary process. That the stock itself is not in the garnishee's hands is, we think, a proposition that requires no further argument. That the certificates, with authority to sell, and a power of attorney to transfer, are in its hands, must be conceded. But the certificates are not the stock. "The stock of a corporation," says Mr. Lowell, "may be defined as the sum of all the rights and duties of its stockholders. * * * Each share therefore is but a fraction of all the rights and duties which compose this sum. * * * A share of stock in a corporation consists of a set of rights and duties between the corporation and the owner of the share."

These rights and duties are in fact and law quite distinguishable from the certificates and the power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but it is not in law the equivalent of those

rights and duties. They are muniments of title, but not the title itself; much less the real property.

While these certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property (see *Ayres v. French*, 41 Conn., 142), yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself, which is simply evidence of the debt, is not. So with stock. That may be attached, but the certificates cannot be.

Again. The books of the bank show that the title to the stock is in the defendants. As there can be no transfer of the stock except on the books of the bank, no title can exist, except in the original subscribers, by any other means than a transfer. Our own court has said, in *Northrop v. Newtown & Bridgeport Turnpike Co.*, 3 Conn., 544, that "the transfer of stock on the books of a company does not operate by giving notice of an antecedent conveyance, but is a fact essentially necessary to originate a title, before the happening of which registration no title has been or can be transferred." But the bank is a foreign corporation. No part of its capital or property is within the jurisdiction of this court. The certificates and authority to transfer are held by one of our citizens; but we cannot through them reach the stock or take any action relative thereto which the authorities of the bank or the courts of Indiana are bound to respect.

It was suggested that these assignments and powers of attorney, being executed in blank, the officer may sell them at the post and deliver them to the purchaser, and that he may fill the blanks so as to have the stock transferred to himself. But, meanwhile, what becomes of the rights of the insurance company? It has the undoubted right to retain the possession of the certificates as its security; and we know of no power in our courts to compel it to part

with them at the instance of another creditor. How then is the officer going to deliver possession to the purchaser?

If we attempt to compel a sale of the stock for the purpose of paying the debt due to the garnishee and in that way reach the surplus for the attaching creditor, we shall encounter another difficulty. The loans secured by the pledge are to remain so long as it pleases the parties. We know of no process or principle by which the court can directly compel the insurance company in this proceeding to collect those notes against its wishes. The statute of Indiana (sec. 939, Rev. Statutes of 1881), expressly provides that "a garnishee in attachment shall not be compelled, in any case, to pay or perform any contract in any other manner or at any other time than he would be bound to do for the defendant in attachment." On this subject Jones on Pledges, sec. 372, says:—"A creditor of the pledgor could not compel the pledgee to accept payment of the debt before its maturity, even if he could compel such acceptance in any case. It is only by statute that this can be done. Though it has been intimated in a few cases that possibly an attachment of pledged property might be sustained upon payment or tender to the pledgee of the amount due him, yet it is doubtful whether this can be done without express statutory authority therefor. A resort to this expedient seems to have been generally regarded as too hazardous to attempt in the absence of any direct authority to sustain it." To the same effect is Drake on Attachments, sec. 539.

If then the garnishee refuses to sell the stock, how is the sale to be effected? If the stock was within this jurisdiction so that it could be attached by ordinary process and sold subject to the lien of the insurance company, under the implication of our statute, which provides that "rights or shares in the stock of any corporation" may be attached (Gen. Statutes p. 402, sec. 6), the purchaser might remove the incumbrance by paying the debt. Thus indirectly the company might be compelled to receive its money. We know of no other way in which it may be done; and as the stock is in another state that way is not open to creditors in this state.

The equity of redemption in this stock is subject to the garnishee process in the state of Indiana, as we have seen. As the corporation is there, the defendant's interest in the stock may there be reached by creditors. That of itself is well nigh a conclusive argument against attaching it here. If liable to attachment in both states, a serious conflict of jurisdiction would be the probable result.

We desire to be understood as limiting the operation of this principle to the circumstances of this case—being, as it is, an attempt to reach the pledgor's equitable interest by a process of foreign attachment.

And this opinion is not to be interpreted as being in conflict with those legal rules and principles designed to facilitate the sale and transfer of stocks, or as interfering in any way with the convenience of the business public in that regard. This was a pledge and not a sale of stocks. Delivery of certificates of stock with a blank power of attorney to transfer, doubtless may be a good symbolical delivery, but it is not actual delivery for all purposes. Symbolical delivery, as its name imports, is a substitute for actual delivery, when the latter is impracticable, and leaves the real delivery to be made afterwards. As between the parties the whole title passes by such a delivery when that is their real intention. But when the transaction is a mere pledge—placing the title at the control of the pledgee for the mere purpose of securing a debt, without actually transferring the title, no title passes, for the simple reason that that is not what the parties intend. They intend simply security. If a right to the title, with the means of enforcing it, is satisfactory to the parties, courts will not by a forced construction of the transaction inject, so to speak, a title into the pledgee.

A good illustration of giving effect to a symbolical delivery according to the intention of the parties, is afforded by the case of *Cook v. Hallett*, 119 Mass., 148, a case cited by the plaintiff's counsel. *A* delivered to *B* a certificate of stock as collateral security for a debt. *B* thereupon surrendered the certificate to the corporation and took out a new certificate in his own name as trustee. *A* paid the debt

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and *B* delivered the certificate to *A*, with a power of attorney in blank to transfer the stock. After this, and before the stock was transferred on the books of the corporation, *B* was summoned as trustee of *A* in a process of foreign attachment. It was held that he was not liable. The delivery of the certificate to *A* operated as a symbolical delivery of the stock, until the real delivery could be perfected on the books of the corporation. There the parties intended to pass the title; here they did not. If they had so intended the transfer would have appeared on the books of the bank, for apparently there was no obstruction or hindrance to such a transfer. But that is not what the parties intended. They intended simply a pledge, constituting the insurance company at most a special owner in equity for a particular purpose, leaving the defendants the general owners for all other purposes. Now we can not through and by means of that special right and power vested in the insurance company, draw this stock away from the location of the corporation and the domicile of the general owner and bring it within the jurisdiction of the courts of this state. The general rule, as stated by text writers, is that personal property pledged cannot be attached in the absence of any statute authorizing it. Jones on Pledges, sec. 372; Drake on Attachments, sec. 539; McConnell on Trustee Process, sec. 116, *et seq.* and cases cited. See also *Lippitt v. American Wood Paper Co.*, 14 R. Isl., 301. If by this it is intended to say that property pledged cannot be attached so as to prejudice the rights of the pledgee, it will doubtless be accepted as a correct statement of the law; but if it is intended to go further and say that if the pledgee is satisfied, by the payment of his debt or otherwise, even then it cannot be attached, the proposition, to say the least, is questionable. It may be difficult to assign any good reason why a debtor under such circumstances may object to an attachment. But we have no occasion to discuss this question. Our present inquiry concerns only stock in a corporation. When and to what extent that is attachable in this state depends entirely upon statute law.

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In Maine, Massachusetts, and some other states, it is provided by statute that pledged property may be attached, and the attaching creditor is required to pay the debt within a limited time, and he thereafter holds the thing pledged by his attachment, free from any incumbrance. In Indiana, as we have seen, any interest in the stock of a corporation may be taken by a garnishee process, making the corporation the garnishee. In Connecticut any right, legal or equitable, in such stock, may be taken by ordinary attachment, and that has been held to apply to the pledgor's interest in stock pledged and standing in the name of the pledgee. *Middle-town Savings Bank v. Jarvis*, (supra).

Thus the question before us, in one aspect of it, resolves itself into the question of the construction of our statute. Obviously the statute can have no operation outside the limits of the state. When it speaks of "rights or shares in the stock of any corporation," it has exclusive reference to corporations existing under our laws, and cannot affect rights in corporations existing under the laws of other states. Therefore the statute referred to does not authorize the attachment of the defendants' interest in the stock in question.

It is further contended that this interest may be attached under the general statute relating to attachments, it being the policy of our law to subject all a man's estate not specially exempt to the payment of his debts. But that statute relates to ordinary process and not to the process of foreign attachment; it is limited, and must be limited, to property in this state; it has and can have no extra-territorial operation.

It follows that the plaintiffs take nothing by their attachment, and that there was no error in dismissing the complaint.

In this opinion the other judges concurred.

BENJAMIN GILBERT *vs.* JOHN A. DECKER AND ANOTHER.

A vendee who takes possession at a time subsequent to the sale, but before the rights of creditors have accrued by attachment or otherwise, can hold the property against creditors.

The retention of possession raises a presumption of fraud only in favor of attaching creditors or those who stand in their position.

The presumption of fraud does not exist in the case of the sale of property exempt from execution.

[Argued October 15th—decided October 23d, 1885.]

ACTION for the wrongful taking of a horse; brought to the City Court of the city of Hartford and tried to the jury before *Bennett, J.* Verdict for the defendants. Appeal by the plaintiff. The case is sufficiently stated in the opinion.

F. Chamberlin and *H. R. Mills*, for the appellant.

C. M. Joslyn, for the appellees.

LOOMIS, J. The plaintiff claimed to have proved that the horse, the subject of this suit, was in good faith and for valuable consideration, purchased by him of his father in the spring of 1880, but it was conceded that there was no sufficient change of possession as against attaching creditors until February 7th, 1885, when there was a complete delivery to the plaintiff, who had exclusive possession until the 16th day of the same month, when it was attached as the property of the father on a suit in favor of Decker the principal defendant.

The question for review, arising upon these facts, is, whether the taking of possession before the attachment could avail to perfect the plaintiff's title, so that he can hold the horse against the claim of the defendant?

The city court held, in effect, that the plaintiff's tardy possession was of no avail against a subsequent attachment. We think the ruling was not in accordance with the law of

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this state as generally recognized by the legal profession and as enunciated at least in two instances by this court.

The first case is that of *Calkins v. Lockwood*, 16 Conn., 276, where one Bradley, an iron manufacturer, having occasion to purchase large quantities of coal on credit, made an agreement with one Payne that the latter would become surety for the coal Bradley had purchased or might afterwards purchase, and to secure Payne assigned to him all the iron made or to be made, and all the stock and personal property in and about the furnace, but the possession remained with Bradley. The latter afterwards purchased coal of one Calkins, and within about a year after the agreement was made became insolvent and absconded, when Payne, for the purpose of securing himself, went to the furnace and took possession of a quantity of iron which had been manufactured subsequently to his agreement with Bradley, and removed it a short distance and sold it to Calkins, but before the sale to Calkins and while in Payne's possession it was attached by other creditors of Bradley. Calkins brought an action of trover against the sheriff and the attaching creditors, and his title depended on the validity of the conveyance from Bradley to Payne, which was sought to be impeached on several grounds, one of them being that the conveyance to Payne was not accompanied with a change of possession. Upon this point WILLIAMS, CH. J., in delivering the opinion of the court said: "It is said that possession was essential to accompany the contract, whether it was a sale or a pledge. The general principle upon this subject is not denied, as stated by the court in *Osborne v. Tuller*, 14 Conn. R., 529. And so too it is the essence of the contract of pledge that there should be an actual delivery. * * * But as in this case possession was taken before the attachment, it does not seem necessary to settle the question what would have been the condition of the parties before possession was taken. * * * The owner had given Payne a right to take possession. That right may not have been complete until possession taken or delivery had, and then it seems to us the right of Payne

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became perfect and complete; and we have seen no case among those we have examined that contradicts this principle."

The other case is that of *Hall v. Gaylor*, 37 Conn., 550, and it is equally conclusive of the question. The plaintiff had purchased certain cloth of the manufacturer and allowed it to remain in the possession of the latter so long that it was conceded that the sale was void as to attaching creditors. Thereafter a portion of the cloth was by order of the vendee delivered on board a steamboat to be conveyed to New York, but a portion was left in the mill, as to which no change of possession ever took place. The cloth, after its delivery on board the boat, was by the vendor, but without the vendee's authority, brought back to the mill, where it was attached with other property as belonging to the vendor. The court, FOSTER, J., delivering the opinion, said: "Now although the original sale of the goods left in the mill was fraudulent and void in law as to attaching creditors, it was completed and made valid by the subsequent delivery on board the boat of all which were so delivered prior to any attachment. The agent of the company ordered them back, and a portion came back, but that fact cannot affect the rights of the plaintiff. His title was complete and perfect by delivery on board the boat; as between the parties it was so from the first, and no act of the vendors, or any officer of theirs, any more than that of a mere stranger and wrongdoer, could divest or prejudice that title." We might well rest the discussion here upon our own decisions. If however we pass to other jurisdictions we shall find ample support. *Bartlett v. Williams*, 1 Pick., 288; *Shumway v. Rutter*, 8 Pick., 447; *Kendall v. Sampson*, 12 Vermont, 515; *Blake v. Graves*, 18 Iowa, 312; *Cruikshank v. Cogswell*, 26 Ill., 366; *Clute v. Steele*, 6 Nev., 335; *Berry v. Ensell*, 2 Gratt., 333; *Snyder v. Gee*, 4 Leigh, 585; *Coty v. Barnes*, 20 Vermont, 19; *Wilson v. Leslie*, 20 Ohio, 161; *Brown v. Webb*, id., 389; *Frank v. Miner*, 50 Ill., 445. In Hilliard on Sales, 3d ed., p. 183, note a, it is said that "the general rule may be laid down, that, where

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a vendee takes possession at a time subsequent to the sale, but before the rights of creditors accrue by attachment or otherwise, he shall hold against creditors."

As opposed to these authorities the defendant cites—*Carpenter v. Mayer*, 5 Watts, 483; *Gardenier v. Tubbs*, 21 Wend., 169; *Franklin v. Gummersell*, 9 Misso. App., 84; *Cheeney v. Palmer*, 6 Cal., 119; *Watson v. Rogers*, 53 Cal., 401. The case of *Carpenter v. Meyer*, *supra*, was decided in 1836. The court, starting from the premises that the retention of possession was a fraud *per se* against everybody, gave no effect to taking possession before a levy, but it seems to us that the same court in *Hoofsmith v. Cope*, 6 Wharton, 53, decided in 1841, and *Smith v. Stern*, 17 Penn. St., 360, decided in 1851, clearly recognized the principle for which we contend, so that the case of *Carpenter v. Meyer* is in substance overruled, although not so in terms.

In *Gardenier v. Tubbs*, 21 Wend., 169, the head note seems to lay down a proposition in accord with the defendant's claim, but it was a case where the property in question had been sold on execution by a sheriff and the plaintiff had purchased it for about half its value, upon an agreement with Whitcomb, the execution debtor, that it should be left in his hands to be again sold by him, and that whatever it should bring more than the plaintiff's debt Whitcomb should retain. COWEN, J., in delivering the opinion of the court, disposed of this feature of the case as follows: "The fraud was completely established independently of Whitcomb's deposition. The possession after sale, especially when fortified by the agreed trust for Whitcomb's benefit, as proved by Phillip P. Graff, fully authorized the judge to direct a verdict for the defendants." This case therefore, in view of the special facts upon which it is based, cannot have much weight as opposed to the decisions that accord with our own; and besides, the same court in *Levin v. Russell*, 42 N. York, 251, and *Murray v. Riggs*, 15 Johns., 571, gave effect to taking possession before the lien of creditors had attached and recognized a principle inconsistent with the claim of the defendant in the case at bar.

The cases from Missouri and California have no application because they were controlled by the special provisions of their statute law. In *Watson v. Rodgers*, 53 Cal., 401, RHODES, J., in delivering the opinion, quotes section 3440 of the Civil Code, which is as follows: "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors *while he remains in possession*;" and then adds: "The code does not limit the creditor to a seizure while the property remains in the possession of the person attempting to make a transfer of it, but its effect is to make the attempted transfer fraudulent and therefore void as against the demands of a person who was a *creditor during the time*."

This case, so far from contravening the existence of a common law rule such as obtains with us, impliedly concedes that, were it not for the express provisions of the statute, the creditor might be limited to a seizure while the property remained with the vendor. At any rate such is the clear limitation in our law. As between the parties a sale is good without delivery, and the doctrine of taking possession within a reasonable time does not apply, for the vendor can at any time deliver or the vendee take immediate possession, and no one can be heard on the question except one who takes action and acquires an interest in the property while the vendor retains possession. In short our rule is that the retention of possession raises a presumption of fraud only in favor of attaching creditors, or those who legally represent them, as in the case of trustees in insolvency. In consistency with this limitation we also hold that the rule does not apply to the sale or mortgage of goods that are exempt from execution. *Patten v. Smith*, 4 Conn., 455; *Foster v. McGreggor*, 11 Vermont, 595.

It is said that one reason given for the rule making the retention of possession by the vendor fraudulent, is that the

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possessor thereby may gain a false credit, and that the creditor actually misled ought to be allowed to set aside the transaction. This would require a radical change in our law. The inquiry is not whether the creditor was in fact misled, or when and under what circumstances his debt was contracted, or whether the debt is old or new, but simply whether he attached the property while possession was retained by the vendor. A tardy creditor cannot object to a tardy change of possession, for until possession taken he might have secured his debt, but afterwards it is too late.

The final claim of the defendants, that it is apparent from the record that the charge did not prejudice the plaintiff, we cannot accept. It is true there was another issue before the jury which, if determined against the plaintiff, would be conclusive, namely, whether the sale to the plaintiff was *bonâ fide*. The defendant claimed fraud in fact and as tending to show it referred to the extraordinary delay in delivering the horse. This was a circumstance to be considered by the jury, but the law could not predicate actual fraud upon that fact. What view the jury took of that question it is impossible to tell from the record. The plaintiff offered evidence to show that the sale was in fact honest and for a valuable consideration and he was entitled to have the law given to the jury upon that assumption in substance as he claimed. The charge as given upon the conceded facts rendered a verdict against the plaintiff inevitable.

There was error in the charge of the court and a new trial is ordered.

In this opinion the other judges concurred.

THE STATE *vs.* PATRICK McMAHON.

The act of 1882 (Session Laws of 1882, p. 186), provides that if any licensed person "shall sell or deliver any intoxicating liquor to a minor," he shall be fined, &c. Held that a delivery to a minor sent by his father to purchase liquor for him, did not come within the act.

[Argued November 13th, 1885—decided January 22d, 1886.]

COMPLAINT by a prosecuting agent, for the sale and delivery of intoxicating liquor to a minor; brought, by appeal of the defendant from the judgment of a justice of the peace, to the Superior Court in Hartford County, and tried to the jury in that court, on the plea of not guilty, before *Carpenter, J.*

The statute charged to have been violated is as follows: "Every licensed person, who by himself, his servant or agent, shall sell or deliver spirituous and intoxicating liquor to any minor, * * * or allow any minor to loiter on the premises where such liquors are kept for sale, shall be fined not more than fifty dollars, or be imprisoned not less than ten nor more than sixty days, or both." Acts of 1882, ch. 107, part 6, sec. 4.

The defendant held a license for the sale of liquors at the place where the liquor in question was sold and delivered. On May 23d, 1885, Sarah White, a minor, was directed by Michael White, her father, to go to the defendant's saloon near by, and purchase a pint of gin for him. The father gave the child a bottle and money to pay for the liquor. She went to the defendant's place as directed. He kept a grocery store, with a bar in an adjacent room. On entering the store the child handed the bottle and money to the defendant and told him her father sent her for a pint of gin for himself and sent the money. The defendant went into the bar-room, the child remaining in the grocery store, filled the bottle, corked it, and returned it to the child. The child took it directly home, without removing the cork, and

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delivered it to the father. The liquor was entirely for the father's use, and the child did not use any of it. The defendant's counsel claimed that the above facts, which were admitted, did not constitute an offense. The court ruled otherwise, and the jury returned a verdict of guilty. The defendant appealed to this court.

J. L. Barbour, for the appellant.

"The person to whom the sale was made is material. That is the element which gives character to the act and is the only criminal element in the transaction." *Com. v. Latinville*, 120 Mass., 385. Now this being so, if Michael White bought the liquor and Michael White received it, there could be no crime. The case finds that he did both. He sent the child to the defendant's store to make a purchase for himself; he gave her the money to pay for the liquor and a bottle to contain it; she followed her father's directions exactly; she told the defendant that her father sent her for the liquor for himself; she received it from the defendant for her father and gave it to him exactly as she had received it. In other words, she was the agent of her father for the purchase, she disclosed her agency to the defendant, and she faithfully fulfilled all the duties of that agency. And so the purchase was that of the principal only, and therefore the sale was only to the principal. "Where an agent expressly contracts in the name of his principal, and that is understood by the party with whom he contracts, such contract is binding on the principal only." 1 Swift Dig., 325. "Where a person contracts or purchases as agent, and is known to the vendor to be such, the contract is with the principal." *Siegel v. The People*, 106 Ill., 89. If the defendant had been unlicensed, and on the above state of facts had been charged with sale to Sarah White, the evidence would not have sustained the allegation. "Evidence of an unlawful sale of intoxicating liquors to an agent with notice that he was purchasing for his principal, will not support an allegation in an indictment for sale to the

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agent." *Com. v. Remby*, 2 Gray, 508; *Com. v. Gormley*, 133 Mass., 582.

But the state may claim that even if the sale was to Michael White, the delivery was to Sarah White, because she received the liquor. We submit that there was here no delivery within the meaning of the law. The delivery contemplated by the statute is delivery to the minor *for himself and for his own use*. To hold otherwise would be a forced and unnatural construction of the statute. If the transaction at bar was a sale to Michael White, the delivery was to him also. She was his acknowledged agent not only to purchase, but also to receive for him. Delivery to the agent or messenger is delivery to the purchaser. 1 Swift Dig., 378. "The court will not extend the terms of a criminal statute beyond its clear, *legal* meaning. The word *sell* in the Illinois statute will not be construed to mean something different from its ordinary legal import." *Siegel v. The People*, 106 Ill., 89.

The Supreme Court of Massachusetts, which has never been accused of an undue prejudice towards liquor dealers, has decided this very question upon a state of facts similar to those at bar, and upon a complaint brought under a statute like ours in every essential particular. The case is *Commonwealth v. Lattinville*, 120 Mass., 385. The facts were that a minor was sent by her mother, an adult, who furnished the money for the purpose, to the defendant's saloon, and there purchased liquor for her mother's use. The law was as follows: "Each license shall be expressed to be subject to the following conditions: * * * *Fourth*. That *no sale or delivery* of liquor shall be made on the premises described in the license to a person known to be a drunkard, or to an intoxicated person, *or to a minor*." Acts of 1875, ch. 99, sec. 6. And the decision of the court, as condensed in the head-note, was: "A sale and delivery of intoxicating liquor to a minor for his parent's use, is not a sale to a minor within the statute."

W. Hamersley, State's attorney, for the State.

The provisions of the statute, considered in connection with the object clearly sought to be accomplished, show conclusively that a sale or delivery to a minor is prohibited, whether he acts wholly for himself or is doing an errand for another.

The rule of construction which should guide courts in cases arising under penal statutes prohibiting or limiting the sale of liquors, has been settled by a great number of decisions. It may be thus stated: There is always a presumption that the legislature uses a word in the signification which common usage has affixed to it; when a word has a special or technical meaning more narrow than that affixed to it by common usage, and doubt exists as to the signification in which the legislature employed the word, the court must examine the context and consider the object which the act seeks to accomplish, and give the word that meaning which the context indicates the legislature intended and which will most effectually carry out the plain object of the act. *Howard v. Harris*, 8 Allen, 297; *Com. v. Clark*, 14 Gray, 367; *Smith on Stat. and Const. Construction*, § 481.

In the present case, while a doubt may exist as to the meaning to be attached to the word "sell," no doubt exists as to the sense in which the legislature employs the word "deliver." There is nothing to indicate that it is employed in any other sense than that which common usage has affixed to it. But assuming that a doubt exists as to the meaning of both words, the attention of the court is asked to the following considerations relating to the context and the plain object of the act.

The plain object of the act is: 1st. To prevent all traffic in intoxicating liquors by unlicensed persons. The notion of preventing any one from buying, drinking, or having the liquors, does not enter into this object. It aims only to prevent traffic by unlicensed persons. Hence the words of prohibition are words that apply only to traffic. 2d. To prevent certain classes of persons from using or having intoxicating liquors. The notion of preventing traffic, as an

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essential element, does not enter into this object. It aims only to prevent the use or possession of liquor by unfit persons. Hence the words of prohibition are words that apply mainly to transfer of manual possession. A transfer of manual possession without a sale or traffic would not contravene the first object. A sale or traffic without a transfer of manual possession would not contravene the second object.

The word "sell" is used in different parts of the act in its ordinary and broader meaning; while the word "deliver" is clearly used in its ordinary meaning, of "putting into another's hand," and not with any technical significance. No jailer shall "furnish or suffer to be furnished" any liquor to a prisoner except as medicine. § 9. No person "shall deliver" any liquor to any prisoner without permission from the keeper. § 10.

The statute clearly shows that it is not the use of liquor by the minor which is prohibited; the prohibition seeks to prevent the licensed dealer from furnishing any opportunity for its use. He shall not employ in his saloon any minor as bar-tender, porter, or in any other capacity. § 13. He shall not allow any minor to loiter on his premises. § 4. He shall not sell, nor even deliver to (that is, put into the hands of) any minor any intoxicating liquor. § 4.

The weight of authority is in favor of the construction claimed. In the first place, the act is a mere arbitrary police regulation. It is not necessary, in the same sense that it is in most crimes, that "a wrongful act and a wrongful intent" should concur in order to constitute the offense. It is sufficient if the prohibited act is voluntarily committed. The offense is committed, even when the dealer believed and had good reason to believe that the purchaser was not a minor but of full age. *Redmond v. The State*, 36 Ark., 58; *Flynn v. Galesburg*, 12 Bradw., 200; *McCutcheon v. The People*, 69 Ill., 601; *Farmer v. The People*, 77 id., 322; *Ulrich v. Com.*, 6 Bush, 400; *Com. v. Emmons*, 98 Mass., 6; *Roberge v. Burnham*, 124 id., 277; *State v. Cain*, 9 West Va., 559; *State v. Hartfel*, 24 Wis., 60. There are how-

ever cases to the contrary in Ohio, Michigan, and Indiana, and in Alabama the cases are conflicting.

In the next place, as to a delivery to a minor who gets the liquor for another person being an offense. There are very few authorities bearing on this question. In Alabama, where the words of the statute are "sell or give away spirituous liquors to a minor," the court says: "The statute would soon become a dead letter if it was so construed that sales to the minor as agent or servant were excluded from its operation." *Bain v. The State*, 61 Ala., 79. In Indiana it has been held that a sale to a minor who states that he is sent by his mother, the dealer believing the statement, which however is not true, is an offense. *Holmes v. The State*, 88 Ind., 148. In New York it has been held that the fact that the purchasing minor was really the agent of an undisclosed principal, is no defense. *Ross v. The People*, 17 Hun, 592. In Massachusetts the authorities are apparently conflicting. In *Com. v. Lattinville*, 120 Mass., 385, the facts were substantially the same as in this case, and the court held that no offense had been committed. The court bases its opinion on this assumption: "The mischief which the statute designs to prevent is the possession of intoxicating liquors by a minor for his own use and subject to his own control." And it makes this assumption upon the strength of section 15 of the same act, which provides that whoever shall sell or give intoxicating liquors to a minor, or allow a minor to loiter about his premises where such liquors are sold, shall forfeit \$100 to the parent or guardian of such minor, to be recovered in an action of tort. It would seem that the court made a mistake in its statement of the mischief which the statute was designed to prevent. But however that may be, its opinion was induced by a provision of the statute entirely different from any provision in our own statute. In a later case, *Com. v. Finnegan*, 124 Mass., 324, the court sustains a charge to the jury that if the minor "bought the whisky for himself, it would be a sale to him, although he had authority from his mother to buy for her, and stated to the defendant that he was buying for her, and the defendant

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believed that he was so buying," and sustained a refusal to charge that if the minor had authority to buy for his mother, and so stated to the defendant, and the defendant so believed, and the minor did in fact buy for his mother, but after the purchase changed his mind and used the liquor for himself, no offense was committed. Unless this case is held to overrule or modify *Com. v. Lattinville*, two decisions establish the strange doctrine, that a sale to a minor, perfectly innocent at the time, may be made a crime on the part of the vendor by the subsequent acts of the minor.

GRANGER, J. This is a prosecution against a person licensed to sell intoxicating liquors, for the sale and delivery of such liquors to a minor in violation of the act of 1882, which provides that "every licensed person who shall sell or deliver intoxicating liquor to any minor," shall be fined, &c. Session Laws of 1882, chapter 107, part 6, section 4, p. 186. And the case depends upon the construction to be given to that act.

The statute is a penal one and is to be strictly and fairly construed and not to be extended beyond cases clearly within both its letter and spirit. This rule is well settled. "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers." 4 Bac. Abr., *Statutes*, sec. 45. "Penal statutes are always to be strictly construed for the benefit of the citizen; nothing more is to be deduced from the words than they expressly warrant, and they are not to be extended by implication." 1 Swift's Dig., 13; 1 Black. Com., 61. In *French v. Gray*, 2 Conn., 118, HOSMER, J., says: "Instances of restrictive legislation, narrowing the liberal operation of a statute, have been frequent; and criminal laws of the most comprehensive expression are not considered as including idiots or mad-men. * * * By 1 Edw. II. the breaking of a prison by a prisoner confined for felony, is made a felony; but if the prison is on fire, and in order to save his life the prisoner breaks it, this act, though di-

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rectly contrary to the letter, is deemed to be no violation of the statute. Plowd. Rep., 13."

In prosecutions under the same statute that we are now considering, for keeping open places where liquors are sold on Sunday, we have recently held, in *State v. Ryan*, 50 Conn., 411, that a literal keeping open of such a place for the ordinary use of the family and boarders of the keeper, was not a violation of the statute.

Applying the rule we have stated, a majority of the court are of opinion that the facts of this case do not bring it within the intent and spirit of the act, although it may come within its letter, and that there has not been a violation of the statute.

The facts show no purpose on the part of the defendant to practice any subterfuge or attempt to evade the law. Nor do they show in themselves any dishonest purpose. If any offense was committed it consisted solely in the handing of the bottle containing the liquor to the child; for, unquestionably, the sale was in law to the father, the child having disclosed her agency and stated the errand upon which she was sent by her father. The sale to the father was a legal sale, the defendant being a licensed vendor, unless the act of passing the bottle into the hands of the child made it illegal. It does not seem reasonable to suppose that it was the intention of the legislature to make an act, innocent as this was in itself, a crime, when no injury to the child could result; for the bottle of liquor, so long as it was not opened, was as harmless as a package of tea, or any other article that children are so frequently and so properly sent to purchase.

The intent of the provision in question in the statute was, as it seems to us, solely to prevent a licensed vendor of liquors from selling to minors, and the other classes mentioned in the act, liquors for their own use. The mischief to be remedied was the obtaining of liquors by those classes for their own indulgence. The seller was not to furnish them liquors for this purpose by sale or gift or delivery. The word "deliver," as here used, is of the same import as

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the word "give." Both these words are used in the act with apparently the same intent, or substantially the same. In the third section, in case of notice by the selectmen to the dealer, he is forbidden to "sell, exchange or give." In section four, which states the penalty, the words "give" and "exchange" are omitted and the words "sell or deliver" only used. Webster defines the word "deliver"—"to give or transfer." In this case it seems clear that the words "sell or deliver" mean simply that the dealer shall transfer the liquor to the interdicted persons by sale or gift.

"A statute ought to be so construed that no man who is innocent can be punished or endangered." 4 Bac. Abr., *Statutes*. "No statute should be construed in such manner as to be inconvenient or against reason." Carthew, 136; 1 Inst., 97.

A recent decision of the Supreme Court of Massachusetts, in a case almost identical with the present one, both as to the statute construed and as to the facts, sustains the view we have taken. *Commonwealth v. Lattinville*, 120 Mass., 385.

There is error in the ruling of the Superior Court and a new trial is ordered.

In this opinion PARK, C. J., and PARDEE, J., concurred. LOOMIS, J., dissented. CARPENTER, J., having tried the case in the court below, did not sit.

WILLIAM GOULD, JR., AND OTHERS *vs.* DAVID BANKS
AND ANOTHER.

The act of 1882 (Session Laws 1882, p. 137) provides that the reports of the decisions of the Supreme Court of the state shall thereafter "be published by the state, under the supervision of the comptroller, who shall cause the volumes to be stereotyped, and copyrighted in the name of the secretary of the state." The comptroller made a contract with Banks & Brothers for the printing and selling by them at a price named of the next five volumes, the contract providing that they

58 415
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should take out a copyright on each volume in the name of the secretary for the benefit of the state, and that the volumes should be stereotyped, the plates to belong to the state and Banks & Brothers to have the exclusive right to print from them. Before the contract had expired certain publishers of weekly law magazines applied to the court for an order that the reporter should furnish them copies of all opinions as they were filed with him, on their request and payment therefor, for immediate publication in their magazines. Motion denied, on the ground that it would be a violation of the rights of Banks & Brothers under their contract.

The judges and the reporter being paid by the state, the product of their mental labor is the property of the state, and the state has power to take for itself a copyright of it, and it is for the state to say when and in what manner the decisions of the court shall be published.

The taking of the copyright does not offend the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the judges for their determination in a particular case constitute no part of the record therein; and these are accessible to all who desire to use them in the enforcement of their rights.

[Argued December 29th, 1885—decided February 12th, 1886.]

APPLICATION to this court, made informally by agreement of the parties and by consent of the court, for an order that the reporter of the court should furnish to the applicants, at their request and at their expense, copies of all opinions of the court as they should be filed with him, to be printed in certain weekly law magazines published by them.

The applicants were William Gould, Jr., & Co. of Albany, N. York, publishers of The Eastern Reporter; The Lawyers' Co-operative Publishing Company of Rochester, N. York, publishers of The New England Reporter; and The West Publishing Company of St. Paul, Minnesota, publishers of the North Eastern Reporter. Banks & Brothers, law publishers of the city of New York, opposed the motion on the ground that they were entitled to the exclusive publication of the opinions of the court under their contract with the state.

Previous to the passage of the act of 1882 the reporter had published the reports in his own name and for his own benefit. In that year an act was passed (Session Laws of 1882, p. 137.) which provided as follows:—"After the

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forty-eighth volume, now in press, the reports shall be published by the state, under the supervision of the comptroller, who shall cause the volumes to be stereotyped, and to be copyrighted in the name of the secretary, for the benefit of the people of the state."

Under this act the comptroller, on the 7th day of September, 1882, made a contract with Banks & Brothers, of which the following are the parts important to the present case.

"The party of the second part is to have the printing and sale of, and is to print and sell, the next five volumes of the Connecticut Law Reports, commencing with volume forty-nine, upon the following terms and conditions:— * * *

"2. The volumes are to be stereotyped. The plates are to belong to the state, but are to be stored by Banks & Brothers and to be kept by them well insured for the benefit of the state. Banks & Brothers are to have the exclusive right to print from the plates, so long as this contract is observed by them, and are to replace them if destroyed or defaced (beyond ordinary wear) in use, being entitled to the insurance money for that purpose if they are destroyed by fire. The state is however to have the right to demand the custody of the plates if it desires. * * *

"3. A copyright of each volume is to be taken out by Banks & Brothers, and at their expense, in the name of the secretary of the state, and is to belong to the state. The copyright papers are to be sent to the comptroller. The copyright is not to be used by the state in any way adversely to Banks & Brothers so long as they keep this contract. The title page of each volume is to state that the volume is published for the State of Connecticut by Banks & Brothers. * * *

"7. The copies of each volume are to be retailed in the market by Banks & Brothers at two dollars per copy, and to be furnished to the trade at one dollar and seventy-five cents per copy; and they are to keep the market always supplied with the volumes and at those prices."

It was agreed by the parties to the present application

that Banks & Brothers, who issued these volumes in quarterly parts called "Advance Sheets," had received many orders for these parts, but that when the prospectuses of these new periodicals appeared, many of the orders were countermanded, and that the sale of them and of the bound volumes had seriously diminished. Also that the value of their contract consisted in the exclusive right of publication.

It was also agreed that the applicants had requested the reporter to furnish them copies of the opinions, but that he had declined to do so unless directed by the court.

L. E. Stanton and *H. S. Stearns*, for the applicants, contended that opinions of the courts were not the subject of copyright, (*Wheaton v. Peters*, 8 Pet., 591; *Banks v. Manchester*, 23 Fed. Rep., 143); that the act of 1882 did not authorize the comptroller to make a contract giving the publisher a right to the exclusive control of the opinions; that, if it did so authorize him, the contract made had not in fact given Banks & Brothers that exclusive right; and that the early publication of the opinions, in the less expensive manner proposed by the applicants, would be greatly for the public interest.

C. E. Gross, for Banks & Brothers, conceded that a reporter would have no such property in the opinions of the court that he could obtain a valid copyright for them, but contended that, the judges and the reporter being paid by the state, the product of their labor belonged to the state, and that this ownership was all that was necessary to enable the state to obtain a valid copyright, (*Drone on Copyright*, 161, 255); that the state, in passing the act of 1882, had intended to secure the protection of this property by a copyright; that the comptroller had power under the statute to make the contract with Banks & Brothers; that that contract gave them the benefit of the copyright and necessarily, as well as in terms, the exclusive right of publication; and that the advance publication of the opinions by the applicants would not only be a serious injury to Banks

& Brothers under their contract, but a loss to the state of the benefit of its copyright and make it liable to Banks & Brothers for damages.

PARDEE, J. For the information of the public the state of Connecticut publishes reports of cases argued and determined in the Supreme Court of Errors. The volume is prepared for publication by the official reporter, and contains the opinions written by the judges, together with head-notes to all cases, foot-notes to some of them, statements of facts, a table of cases, and an index to subjects, the work of the reporter. The judges and the reporter are paid by the state, and the product of their mental labor is the property of the state, and the state, as it might lawfully do, has taken to itself the copyright. The statute requires the comptroller to supervise the publication of the volumes, taking a copyright for the benefit of the state. Under this statute that officer for a valuable consideration granted to Banks & Brothers, who agree to print and sell the reports at a fixed price, the protection of the copyright for a limited period. During three or four years the state, with knowledge, has acquiesced in the terms of this contract and accepted the resulting benefits. If, therefore, we should now direct the reporter to furnish copies of opinions to the petitioners, that they may sell them to the public, in advance, for their own profit, we should in effect advise the state to a breach of contract.

It is for the state to say when and in what manner it will publish these volumes; and the taking of the copyright in no sense offends the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the Supreme Court of Errors for its determination in a given cause constitute no part of the record therein; the judgment stands independently of these. Moreover, these are accessible to all who desire to use them in the enforcement of their rights.

The application for an order that the reporter furnish copies of all opinions to the petitioners is denied.

In this opinion the other judges concurred.

SUPREME COURT OF ERRORS,
HELD AT BRIDGEPORT, FOR THE COUNTY OF
FAIRFIELD,

ON THE FOURTH TUESDAY OF OCTOBER, 1885.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

FRANK G. FOWLER *vs.* WILLIAM H. MALLORY AND
OTHERS.

M owned two patents for a mechanical contrivance for steering propellers, and the plaintiff a patent for a device for the same purpose that could be used advantageously with that of *M*, and they agreed that the plaintiff's patent should be assigned to *M*, who should go to England and make an effort to sell the three together, for such price as he should think best, and if they were not sold within one year that *M* should re-assign the plaintiff's patent to him, the plaintiff to be saved from all expense in the matter. If the patents were sold *M* was to pay the plaintiff \$8,000; if either or all should be sold for more than \$80,000 the plaintiff was to be paid ten per cent on the excess above that sum until the sales reached \$150,000, when he was to receive no further percentage. The plaintiff made no warranty of the validity or salability of his patent, and *M* required none. *M* at once went to England and made every reasonable effort to sell the patents together, but it was there discovered, what none of the parties had before suspected, that an English patent older than the plaintiff's, involving nearly the same improvement, rendered his patent wholly unsalable. *M*, finding it impossible to sell the three patents together, sold his own patents for about \$4,000 in cash and certain stock, of the nominal value of £12,000, but which proved to be of no real value; and within the time limited by the contract he tendered to the plaintiff a re-assignment of his patent, which the latter refused to receive. In a suit on a bond given for the faithful performance of the contract by *M*, it was held that the plaintiff was entitled to recover \$8,000, with interest from the time of the sale of his patents by *M*. (Two judges dissenting.)

In a suit on a penal bond only the sum equitably due can be recovered.

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The damages were not to be enhanced by the large amount of stock taken by *M* on the sale, as it had proved worthless.

Although *M* had received but about \$4,000 for his patents, the plaintiff was held to be entitled to the \$8,000, as being the lowest sum which by the contract he was to receive.

[Argued October 27th—decided December 18th, 1885.]

DEBT upon a bond ; brought to the Superior Court. Plea, a general denial, with notice. The case was referred to a committee by whom the following facts were found :—

On the 22d day of April, 1878, the plaintiff and William H. Mallory, one of the defendants, signed and duly executed in duplicate the following contract :—

“ This agreement made and entered into this 22d day of April, 1878, by and between Frank G. Fowler of Bridgeport, Fairfield County, Conn., of the first part, and William H. Mallory of said town, county and state, of the second part, witnesseth :

“ The said Frank G. Fowler for and on account of considerations hereinafter mentioned, and at the special request of said William H. Mallory, agrees to assign, transfer and deliver to the American Propeller Company a certain letters-patent for improvement in steering propellers, numbered 1989, and granted by authority of the Kingdom of Great Britain and Ireland to William Clark in said letters-patent mentioned, and dated May 11th, 1876, as will appear, and duly assigned to said Frank G. Fowler by said William Clark, on the 4th day of October, 1876, as will appear by said assignment duly executed and delivered.

“ The said Frank G. Fowler is to assign and deliver said letters-patent to said American Propeller Company, at the request of said William H. Mallory, upon the following terms and for the purposes hereinafter mentioned, to wit :— To be sold, assigned and transferred to any parties in Great Britain or elsewhere, together with all the rights, privileges, grants and conditions therein contained, for such a sum of money as the said American Propeller Company shall deem advisable ; such sale, leasing or grant is to be made by the American Propeller Company and completed on or before

the 22d of April, 1879, and not thereafter. The said letters-patent are to be sold or leased with and in connection with certain other letters-patent, to wit: A letters-patent granted to Alfred Vincent Newton, of 66 Chancery Lane, dated July 4th, 1867, and numbered 1963, a letters-patent granted to Edward Thomas Hughes, of 23 Chancery Lane, dated July 1st, 1874, and numbered 2277, and now owned by said American Propeller Company, and the said letters-patent so owned by the said American Propeller Company, and dated and numbered as aforesaid, are to be sold with the above patent numbered 1989 and dated as aforesaid, and all sold together. And in case said letters-patent are so sold, leased or disposed of at any price within the time aforesaid, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his executors, administrators, heirs or assigns, the sum of eight thousand dollars, within six months after the date of such disposal or sale. And in case the aforesaid letters-patent, meaning either or all the said patents, shall be disposed of for a greater sum than eighty thousand dollars, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his heirs, executors, administrators or assigns, at the rate of ten per cent., or ten dollars for every hundred dollars, over and above the said eighty thousand dollars, till the amount of such sales reaches the sum of one hundred and fifty thousand dollars, beyond which sum of one hundred and fifty thousand dollars sales the said F. G. Fowler is to receive nothing, or no further percentage. In case no disposition of said letters-patent hereinbefore mentioned and referred to shall be made within the time aforesaid, then the said William H. Mallory, his heirs, executors, administrators or assigns, shall re-assign or cause to be re-assigned the said letters-patent numbered 1989 to the said Fowler, his heirs, executors, administrators or assigns, and restore the same fully and without loss or reservation within three days from the expiration of this contract.

“The said F. G. Fowler is not to be made any loss, cost

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or damage for or on account of this agreement; and the aforesaid ten per cent, or one hundred dollars for each one thousand dollars of sales as aforesaid, is to be rated upon gross sales; and the said William H. Mallory is to cause to be rendered to the said Fowler a correct statement from said American Propeller Company, and sworn to by the president thereof before proper authority, of all sales wherein the above percentage is to be computed, when the same shall be required by the said Fowler."

The bond upon which the suit is brought was executed the same day by William H. Mallory as principal, and by the other defendants, George Mallory and I. DeVer Warner, as sureties, and was for the faithful performance of the foregoing contract by William H. Mallory.

On the same day, and after the execution and delivery of the contract and bond, the plaintiff executed and delivered to William H. Mallory, for the American Propeller Company, an assignment to the company of the letters-patent numbered 1989, which Fowler had agreed by the contract to assign to the company.

The American Propeller Company was a corporation duly organized under the joint stock laws of this state, and William H. Mallory was its president and agent, duly authorized to accept for it from Fowler the assignment of the letters-patent, and duly authorized as general agent of the corporation to transact business in its behalf.

Contemporaneously with the delivery by the plaintiff to Mallory of the assignment of the Clark patent, he delivered to Mallory the grant issued under authority of the Kingdom of Great Britain and Ireland to William Clark, and the assignments thereof from Clark to the plaintiff.

At the time of the execution of the contract, bond and assignment, Mallory was on the eve of departure for London, in company with Gen. Joseph R. Hawley, they being agents of the American Propeller Company for the purpose, among other things, of disposing of the letters-patent mentioned in the contract, and for that purpose they took with them the originals of the Clark patent and assignments.

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They also took to London, with authority to dispose of the same, the letters-patent described in the contract as letters-patent granted to Alfred Vincent Newton, No. 1963, and letters-patent granted to Edward Thomas Hughes, No. 2277, then owned by the American Propeller Company.

Immediately upon their arrival in London they entered upon the business contemplated by their voyage, and attempted in good faith to dispose of the letters-patent No. 1989, granted to William Clark, in connection with the other letters-patent Nos. 1963 and 2277.

On the 12th of October, 1868, letters-patent under the authority of the Kingdom of Great Britain and Ireland had been granted to one William Moodie, numbered 3122. This letters-patent will be hereinafter referred to as the Moodie patent, and the device or invention thereby patented as the Moodie device or invention, while the letters-patent No. 1989 will be hereinafter referred to as the Clark patent, and the device or invention thereby patented as the Clark device or invention. The defendants claimed that the Moodie patent anticipated the Clark patent, and that the Moodie device and invention were substantially the same as the Clark device and invention.

When Mallory and Hawley began their business in London neither of them had ever heard of the Moodie patent, or of his device or invention; but in consequence of something said to them by one Palmer, with whom they were trying to negotiate for the sale of the patents soon after their arrival in London, they got from the patent office a copy of the Moodie patent and gave it a careful and critical examination.

Up to the time of the discovery by them of the Moodie patent as aforesaid, they had endeavored in good faith to sell all the patents in connection with each other, but by reason of the existence of the Moodie patent and the similarity between the Moodie device and the Clark device, and the possibility that the two devices might be held to be substantially identical with each other, and the knowledge of those facts by themselves and by the parties with whom

they were negotiating, they found it impossible to dispose of the Clark patent.

On the 24th of August, 1878, the American Propeller Company, by Hawley and Mallory acting as its agents and in its behalf, assigned and disposed of the letters-patent numbered 1963 and 2277, to the Mallory Propeller Company, Limited, a corporation duly organized in England; but they were unable, for the reasons aforesaid, to make any profitable use of the Clark patent, and neither they nor the American Propeller Company ever received any proceeds therefrom.

The evidence introduced by the parties respectively upon the question whether the Clark device was or was not substantially identical with the Moodie device included the exhibition of models, from which it appeared that the great feature of each device was a dial-plate with certain lines upon it; the only material difference consisting in the fact that the dial-plate in the Clark device is graduated and numbered, while the dial-plate in the Moodie device is not graduated and numbered; and the un-numbered lines of the Moodie dial-plate are not designed to accomplish, and do not in fact accomplish, the result which the numbered lines of the Clark dial-plate are designed to accomplish and do in fact accomplish. If the dial-plate in the Moodie device were graduated and numbered substantially like the dial-plate in the Clark device, the two devices would be substantially identical with each other for all practical purposes. Without such graduating and numbering of the dial-plate the Moodie device would not enable an officer in a part of the ship distant from the steersman to communicate his wishes to the steersman instantly and intelligibly by quick and short orders, so that the course of the ship could be instantly changed by the steersman in conformity with such orders. With such graduation and numbering of its dial-plate the Moodie device would enable the officer so to communicate his wishes to the steersman, and the steersman so to obey the orders given by the officer. The Clark device, having its dial-plate so graduated and numbered,

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accomplishes that result; and the result so accomplished by means of such graduating and numbering of the dial-plate is a result of great practical utility.

If, upon the facts above stated, the law relating to the patentability of inventions is so that said two devices must be held to be substantially identical, then I find them substantially identical; otherwise not.

Of the ten thousand pounds which, in the contract of the Mallory Propeller Company, Limited, with the American Propeller Company, was stipulated to be paid in cash, there was paid to the agents of the American Propeller Company the sum of £1,245 and no more—said payment being on account of the patents and steam launch mentioned in the contract.

In the making of this payment of cash no discrimination was made between that part of it which was to be considered as paid on account of the patents and that part which was to be considered as paid on account of the launch; but I find that Gen. Hawley was entitled, as between him and the American Propeller Company, to ten per cent. of the amount paid for the patents and to no part of the amount paid for the launch, and that thereupon Hawley and Mallory agreed upon the sum of \$362.52 as the fair amount due to Hawley out of the total amount of cash paid, which amount so agreed upon was in fact received and retained by him. That settlement was just and fair, and of the total sum of £1,245, \$3,625.20 ought to be considered as having been paid on account of the patents and the rest on account of the launch.

Mallory also received as agent of the American Propeller Company, in pursuance of the stipulations contained in the contract with the Mallory Propeller Company, Limited, two hundred and forty shares of the capital stock of that company, which shares were allotted to him as fully paid up shares, and were of the nominal value of fifty pounds each.

These shares never had any other than a speculative value, and never any intrinsic value, and the American Propeller Company never derived any benefit from them.

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Mallory returned to this country early in November, 1878, and on the 9th of November, 1878, at his request, the plaintiff met him at the house of George Mallory in Bridgeport. Wm. H. Mallory then in substance told the plaintiff that he had been unable to sell the Clark patent, because the device had been anticipated in the Moodie patent, and also showed to the plaintiff a copy of the Moodie patent which he had brought from England. At this interview the Clark patent, with the assignments of it, was tendered by Mallory to the plaintiff. He refused to receive them, and left them in the possession of Mallory, who, at the same time, gave him notice that they would be held subject to his order.

On the 21st day of April, 1879, Mallory attempted to deliver to the plaintiff a re-assignment of the Clark patent, which re-assignment had been duly prepared and executed in conformity with the provision for such re-assignment contained in the contract, and the delivery thereof would have been made on that day but for the fact that the plaintiff then avoided it. In so avoiding such delivery at that time the plaintiff was not acting in bad faith, but was governed by the purpose of obtaining the advice of counsel upon the question whether he should then receive the delivery of the re-assignment or not. On the following day the re-assignment was put into the hands of the plaintiff by an agent of Mallory. The plaintiff retained the re-assignment until October 27th, 1879, when, at an interview with Mallory on the cars going from Bridgeport to New York, the plaintiff tendered it back again to Mallory, saying in substance that when the document was given to him in April, 1879, he did not know that the patents had been sold or the contract broken. Mallory refused to accept the document, whereupon the plaintiff laid it in his lap and left it there.

At the last named interview the plaintiff made demand upon Mallory for the amount due him under the contract, and for the amount due on the bond; and also made demand for a sworn statement of sales in conformity with the

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terms of the contract; the plaintiff claiming at the time to possess proofs that the patents had been sold. In reply Mallory said in substance that the patents had not all been sold; that a stock company had been formed, but a full sale had not been completed, the plaintiff's patent not having been sold.

At that time Mallory was still the president and general agent of the American Propeller Company, and he did not then or at any subsequent time, as president of the company or otherwise, make to the plaintiff any sworn statement of any sales of any of the patents or cause any other person to make such sworn statement; said Mallory did not then or at any other time pay the plaintiff any amount due him under the contract or bond.

On the 30th of October, 1879, and before the commencement of this suit, the plaintiff made demand upon the defendants, George Mallory and I. DeVer Warner, for the amount due him upon the bond, at the same time stating to each of them that he had previously made demand for the amount due upon the bond and contract upon William H. Mallory, and that the latter had upon such demand refused and neglected to pay anything thereon, and that the contract and condition of the bond had been broken; but George Mallory and Warner then refused, and have ever since continued their refusal, to comply with the demand so made upon them; and the plaintiff has never been paid anything by reason of the contract and bond.

Down to the time of the signing of the contract and bond the plaintiff had never heard of the Moodie patent, and had no knowledge or reason to suppose that the Clark patent had been anticipated or was interfered with by any other patent previously issued in the English patent office or elsewhere; but on the contrary he supposed that the Clark patent was valid, and that the device therein described was protected by it and was new and useful.

The plaintiff did not make any fraudulent representations or statements to William H. Mallory, or to either of the

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defendants, concerning the value, utility, novelty or validity of the Clark patent, or of the subject matter thereof.

For some time previous to the execution of the contract negotiations in regard to the sale by the plaintiff of the Clark patent had been carried on between the plaintiff and Mallory, acting in behalf of the American Propeller Company, which negotiations finally resulted in the execution of the contract. During these negotiations Mallory gave the plaintiff to understand that he did not ask him to warrant or guarantee the validity of the Clark patent, and did not expect him to do it, and desired the plaintiff to obtain the opinion of George Gifford, Esq., a patent lawyer in New York, which opinion, in favor of the validity of the patent, the plaintiff thereupon obtained and delivered to Mallory shortly before the execution of the contract.

I further find that the plaintiff made no express warranty of the value, utility, novelty or validity of the Clark patent to Wm. H. Mallory or to either of the other defendants, unless such express warranty is found by implication in the facts hereinbefore set forth.

The Clark patent was originally obtained by William Clark, as the agent of the plaintiff, directly from the English patent office, and was assigned by Clark to the plaintiff on the 4th day of October, 1876.

Wm. H. Mallory died on or about the 8th day of November, 1882, and his administrator has duly entered to defend this suit.

Upon these facts the case was reserved for the advice of this court.

S. Fessenden and *F. L. Holt*, for the plaintiff.

1. This was not a bailment, nor do any of the decisions cited by the defendants sustain their claim that it is. The record in this case shows an absolute transfer by the plaintiff of the patent in question to the American Propeller Company, so that the title vested absolutely in the company, and it nowhere appears that there was any bailment created, or that a bailment was even thought of by the

parties. And there was an agreement to re-transfer the patent to the plaintiff provided no sale was made of the patents mentioned within a year from the date of the contract, which shows beyond all question that the company did not hold the patents as bailee, but as absolute owner. This case differs then from all those cited by the defendants, in that, in every one of those cases, the title to the chattels in question did not pass out of the owner, and the parties thus were found, upon the agreements entered into between them, to have had in contemplation a bailment and not a sale. The defendants assume that this is a bailment without authority to support their position, all the authorities agreeing that "wherever there is a transfer of title and delivery of the property on a contract for an equivalent in money, or some other valuable commodity, or the return of the identical thing, it is a sale and not a bailment; hence, if the terms of the undertaking contemplate the payment of money instead of the return of the article or any equivalent, as well as the return of the article itself, the transaction constitutes not a bailment but a sale. This contract does not contemplate a return of the patent, but a re-conveyance of the same; and the recognized doctrine of England and the United States is, that the instant the title in the thing so delivered passes completely over to the new possessor a sale takes effect. Shouler on Bailments, 5; Story on Bailments, §§ 371, 415; Edwards on Bailments, § 415; *Chase v. Washburn*, 1 Ohio St., 244; *Crocker v. Gullifer*, 44 Maine, 491; *Marsh v. Wickham*, 14 Johns., 167; *Hurd v. West*, 7 Cowen, 752.

2. Our statute (Gen. Statutes, p. 444, sec. 1), providing that in actions on penal bonds containing conditions which have been broken, such damages only shall be awarded as are equitably due, and judgment shall not be rendered for the whole penalty unless it appears to be due, which the defendants invoke, cannot aid them upon the ground claimed in their brief, for the reason that, if the defendants failed to carry out their contract, and sold their two patents for the amount stated in the record, the sum due us by the

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terms of the contract is equitably due, and the damages, to which we are in equity entitled for the breach of the bond, are ascertained and fixed by the contract. That amount is "equitably due" which the parties agreed in advance should be the amount of the damages suffered in the happening of certain events. In the event of the sale of any of the patents for any sum whatever less than \$80,000, it was agreed by the parties that the sum to be received by the plaintiff was \$8,000. It was further agreed that in the event of the sale of any of the patents for a greater sum than \$80,000 there would be due to the plaintiff ten per cent. upon all such sums until the sales reached the sum of \$150,000, after which the plaintiff was to receive nothing, or no further percentage. The terms of this contract, therefore, show that the defendants conceded that the sale of either or all of the patents would entitle the plaintiff to receive a sum specifically agreed upon in advance as his compensation therefor. They have, therefore, agreed by this contract that the above sums, in the above events, would be the damages due in our action on this bond. The parties had a right to make the contract which they did make, and to fix beforehand the value of the patent, and agree, as they did specifically, upon the sums which should be paid the plaintiff in the happening of the events therein provided for; and a court of equity would not relieve from such a contract, or make a different contract for the parties, no fraud being shown; but upon the claim of the defendants, if they had sold our patent for five dollars and the others for the remainder of the amount received by them, we would be obliged to prove some other measure of damages than that which the parties fixed and agreed upon in their contract. If *A* enters into a contract to build a house for *B* according to plans and specifications agreed upon between the parties, for a certain sum, and *B* gives a bond to pay the sum upon the completion of the contract, he can not, in an action on the bond, set up, for the purpose of reducing the damages, that he could have procured the building of the house for a less sum than that agreed between him-

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self and *A*; and the same rule would hold good upon a sale or contract concerning any species of property. Egglestone on Damages, § 642; 1 Sutherland on Damages, 475, 481-490; Wood's Mayne on Damages, §§ 158, 159, 162, 163, 164, 170; *Grasselli v. Lowden*, 11 Ohio St., 349; *Springdale Cemetery Asso. v. Smith*, 24 Ill., 480; *Pierce v. Fuller*, 8 Mass., 223; *Holmes v. Holmes*, 12 Barb., 137; *Dakin v. Williams*, 17 Wend., 447; *Bagley v. Peddie*, 16 N. York, 469; *Astley v. Weldon*, 2 Bos. & Pul., 346.

J. S. Beach and *E. W. Seymour*, for the defendants.

The suit is on a penal bond of William H. Mallory, now deceased, and his sureties, in the penal sum of \$15,000. The liabilities of the surviving sureties are to be found, if found at all, in the condition of the bond. The condition recites that an agreement of even date therewith has been made between the plaintiff and Mallory, touching the sale by Mallory of certain letters-patent owned by the plaintiff; and that if Mallory shall pay all sums of money that may become due to the plaintiff, if such sale be made, or if the patent be not sold, if Mallory shall restore it to the plaintiff within a prescribed period, the bond shall be void. The patent was an English patent and was to be sold in England. Mallory went at once to London, and the committee finds that he used his best efforts, in good faith, to sell the patent as stipulated. Pending those efforts it was discovered that the plaintiff's supposed invention had been anticipated, that the patent was of no value, and that it was "impossible" for Mallory to sell it at any price. Mallory, within the time prescribed by the contract, restored the patent to the plaintiff in the same condition that he received it.

Upon these facts, nothing more appearing, it cannot be denied that the duties imposed upon Mallory by the contract were those of a bailee of the plaintiff's property, bound in good faith to use his best efforts to sell that property to the best advantage, and if sold to pay over the stipulated price, or if not sold, to restore the property to its owner.

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That those duties were fully met and performed by Mallory is not denied. We insist, therefore, that the sureties on this bond are not liable to pay the demanded damages to the plaintiff, for two reasons—first, because he has suffered no damage, and second, because, if he had suffered damage, it was not by reason of any fault or omission of duty on the part of Mallory, the principal on the bond.

But the contract recites that there were two other cognate English patents controlled by Mallory, in connection with which the plaintiff's patent was to be sold, and if so sold he was to receive \$8,000. And the plaintiff insists that, although the sale of his patent, either singly or in connection with the other two, was for the foregoing reasons an "impossibility," still, as Mallory sold the other two patents and received therefor \$3,000, his sureties must pay the plaintiff the \$8,000.

This result is reached under the claim that the agreement referred to in the condition of the bond, rightly construed, was a "pooling contract." Precisely what this term means is not quite clear. Bouvier fails to define it. But the plaintiff explains it after this fashion. He says that as between the owners of such a "pool" the actual value of the respective properties contributed by each "pooler" is an issue foreign to their relative rights in the "pool" itself. A patent, he says, has no more intrinsic value than a lottery ticket. It may, after long litigation, turn out to be valid and valuable, just as a ticket may draw a prize, or the litigation may result in worse than a blank. And it is gravely urged in support of the plaintiff's equity, under this particular "pool," that as Mallory had two tickets and Fowler only one, the chances in the "pool" were two to one in favor of Mallory as against Fowler. The logic of this new theory of equity jurisprudence seems to be that even if Fowler's ticket turns out to be so wrongly numbered, and of such a wrong series as to be excluded from the drawing, yet *non constat* but that if it had been the right number and of the right series it would not have drawn a prize. From these premises the plaintiff concludes that he,

as one of the "poolers," is entitled to his \$8,000, even though his worthless patent was not sold, and not sold because it was worthless.

More than that. This merciless logic pushes the plaintiff still farther beyond the limits of common sense and common honesty, and so far beyond that he demands of these sureties not only \$8,000, as his share in the "pool," but such a sum in addition thereto as will make up \$15,000, which he says would have been the amount of his claim if the "pool" had been sold for \$150,000.

We do not believe that the courts of a state having for its motto "*Qui transtulit sustinet*," will announce these theories to be its law; if so, it will be new law, and our text writers must add to their index of topics, "the liability of sureties under a pooling contract."

But this agreement was in no sense a "pooling" contract, as such a contract is defined by the plaintiff. Mallory did not under it agree absolutely and without qualification to sell the plaintiff's patent within a year after the date of the agreement. The plaintiff agreed to part, for the period of one year and three days, with his legal title to the patent, upon certain specified terms, and for a certain described purpose. The contract contemplates and provides for three contingencies or possibilities, each prefaced with the phrase "in case of." 1st. "In case of" the sale of all three patents together. 2d. "In case of" the sale of the three patents together or of either without the others. 3d. "In case of" the plaintiff's patent not being sold at all. Under the first the plaintiff was to have \$8,000, no matter for what price they were sold. Under the second the plaintiff was to have a certain percentage for sums "over \$80,000 up to the sum of \$150,000." Under the third the plaintiff was to have his patent restored to him, "fully and without loss or reservation within three days after the expiration of the contract." Doubtless the first of these three contingencies was the one the parties expected would happen. Their mutual interests demanded that it should happen. The committee finds that Mallory promptly and in good faith made every effort to the

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end that it should happen. It did not happen for the sole reason that Mallory found it "impossible to dispose of the plaintiff's patent." The plaintiff's patent therefore was not sold, but in pursuance of the agreement was, within three days after the expiration of the contract, "restored to the plaintiff without loss or reservation."

Clearly it is one of those cases in which, from the nature of the contract, it appears that the parties must from the beginning have contemplated the continued existence of the plaintiff's patent as a salable article, a thing which then was and should thereafter continue to be during the period covered by the contract possible of sale, and it being found by the committee that after the execution of the contract, and during the period covered by it, the patent so far ceased to exist as that it was impossible to sell it, there was no such breach of contract as to impose a liability on these defendants.

PARK, C. J. This case depends upon the construction to be given by the following contract, entered into between the plaintiff and the defendant William H. Mallory, on the 22d day of April, 1878. [The contract is fully set out in the statement of facts, *ante* p. 421.]

The plaintiff performed his part of the contract, and the defendant Mallory went to England, taking with him the two letters-patent belonging to the American Propeller Company described in the contract, and the letters-patent belonging to the plaintiff, to perform his part of the contract.

He was duly authorized by the American Propeller Company to do all that he had undertaken to do in the contract, and no complaint is made regarding his efforts to sell all three of the letters-patent together, as the contract required if it could reasonably be done.

But the case finds that it was impossible for Mallory to sell the letters-patent belonging to the plaintiff, owing to the fact that, in the year 1868, letters-patent had been granted to one Moodie under the authority of the Kingdom of Great Britain and Ireland, which anticipated the

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plaintiff's letters-patent to a great extent; still, the case finds that the result accomplished by the Fowler patent by means of the graduating and numbering of the dial-plate, which was common to both, was one "of great practical utility."

Mallory sold the two letters-patent belonging to the American Propeller Company, together with a steam launch belonging to the same company, for the sum of £22,000 sterling; of which amount £10,000 was to be paid in cash, and the remainder in the paid up stock of the English company, called the Mallory Propeller Company, Limited. The case finds that only \$3,625.25 was received in cash on account of the two letters-patent, and the stock of the company, though delivered and received, proved to be of no intrinsic value.

Mallory tendered to the plaintiff a re-transfer of his letters-patent within the time specified in the contract, but the plaintiff refused to accept the same. The case further finds that neither the plaintiff nor the defendants had any knowledge of the Moodie letters-patent at the time of the execution of the contract, or at any time before Mallory learned of its existence while endeavoring to sell the letters-patent in England.

The plaintiff made no fraudulent representations to either of the defendants concerning the value, utility, novelty or validity of his letters-patent at any time, and during the negotiations which ended in the contract Mallory gave the plaintiff to understand that he did not ask him to warrant or guarantee the validity of his letters-patent, and did not expect him to do it, but desired him to obtain the opinion of a certain patent lawyer of New York regarding its utility and validity, which opinion was obtained by the plaintiff and given to Mallory shortly before the execution of the contract.

The case further finds that the plaintiff made no express warranty of the value, utility, novelty or validity of his letters-patent to either of the defendants at any time, unless such warranty can be inferred from the facts stated.

These are the principal facts of the case, and the question is, do they constitute a cause of action against the defendants?

In giving a construction to the contract which is the basis of this suit, we are to look at it as it appeared to the parties when they executed it. Here were three letters-patent, two of them owned by the American Propeller Company and one by the plaintiff, all relating to the same subject matter—the steering of steam propellers. The company's letters-patent contained plans and descriptions of all the necessary machinery and appliances for the purpose, and the plaintiff's set forth a mechanical operation for setting the machinery instantly and properly in motion as the exigencies of the case in steering such vessels might from time to time require. Often a moment's delay in giving the proper direction to the vessel puts it in great danger, if it does not cause its destruction. These three devices seemed peculiarly adapted to each other, and necessary to make up one perfect system of steering propellers. A vessel that had the company's devices would be in great need of the plaintiff's or a similar device; and the plaintiff's without the company's or similar devices would be useless, and consequently valueless. Hence it must have appeared to the parties to the contract that it would be greatly to the advantage of all concerned to sell the three letters-patent together; for, apparently, by so doing each would enhance the value of the others, and be itself enhanced in value at the same time; the combination would largely increase the value of the whole beyond the aggregate separate value of each. They had heard of no device like the plaintiff's, and as this mode of steering propellers was comparatively new, they must have thought that there was but little if any danger that either of the patents had been anticipated by others. We may safely conclude therefore that the parties to the contract were anxious to pool their patents; were anxious to make common property of the proceeds of their sales in a speculative adventure. They had large profits in anticipation. They talked of sales amounting to \$150,000 and

more ; and their only trouble seems to have been how they should divide the proceeds of the speculation.

Neither party asked the other to warrant or guarantee the validity, utility, novelty or value of his respective patent or patents. There is no pretence that the plaintiff requested it of Mallory ; and the case finds that the plaintiff made none regarding his patent, unless the facts found show it by implication. But none can arise by implication, for during the negotiations for the contract it is found that "Mallory gave the plaintiff to understand that he did not ask him to warrant or guarantee the validity of his patent, and did not expect him to do it, but desired the plaintiff to obtain the opinion of a certain patent lawyer of New York." That opinion was obtained by the plaintiff, and delivered to Mallory shortly before the execution of the contract. How, then, is it possible that there could have been any warranty or guaranty by the plaintiff, express or implied, regarding the validity of his patent?

If nothing had been said on the subject there might have been an implied warranty that his patent was valid, and therefore salable ; but here the matter was talked over by the parties, and the defendant told the plaintiff that he did not ask, and did not expect him, to warrant or guarantee the validity of his patent. He wanted the opinion of a certain lawyer, and when that was obtained and presented to him he was fully satisfied. There is no room to claim a warranty, either express or by implication ; yea more, what passed between the parties amounted to an agreement that the plaintiff need not warrant the validity or salability of his patent, and that Mallory would take it as it was, and run his own risk regarding its validity and salability. He was expecting that the plaintiff's patent would largely increase the value of his own, besides furnishing great pecuniary profit in its sale. He was willing, therefore, to forego all security of its salability in order to make the contract.

We come now to a consideration of the contract and an ascertainment of what it means.

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The contention regarding its construction is confined to three important clauses. Two of them relate wholly to the plaintiff's share of the proceeds of the adventure, and the other pools the three patents and makes common property of them in the speculation.

It was impossible to forecast what would be the result. The plaintiff's patent might sell the other two, and the other two might sell the plaintiff's; and the combination might sell all, and add largely to the value of all. So in the first clause it was agreed that the three patents should be sold, leased or disposed of together.

But does this clause mean that under no circumstances any of them could be disposed of without the rest? If we compare this clause with the one which says—"and in case the aforesaid letters-patent, meaning either or all the said patents, shall be disposed of for a greater sum," &c., we learn that such was not the meaning which the parties gave to the language used. They intended, and the clause should be so construed, that one or more of the patents might be sold or disposed of, after all reasonable exertions had been made, during a reasonable length of time, under all the circumstances that might be found to exist, to sell or dispose of them together.

This must be the meaning of that clause, or else Mallory violated the contract by selling the company's patents without selling the plaintiff's in the same sale; and well might it be contended that the plaintiff would have an equitable right to share in the proceeds of such a sale to the same extent that he would have had if his own had been included in the sale. Mallory would be estopped to say that the plaintiff's patent was not included, if he had absolutely bound himself to sell all three of the patents together or sell none of them.

If we have given the correct construction to the first clause, then the contract must be construed in the same way that it would be if the first clause had contained the meaning we have given it, written out in full.

The second clause in controversy immediately follows

the first, and is as follows:—"And in case said letters-patent are so sold, leased or disposed of, at any price, within the time aforesaid, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his executors, administrators, heirs or assigns, the sum of eight thousand dollars, within six months after the date of such disposal or sale."

The words, "so sold, leased or disposed of," refer to the first clause, and mean sold, leased or disposed of as therein described. This reference to the first clause makes it, with the construction that should be given to it, a part of this clause, as much as it would be if it was written out in full in it.

We have seen that the first clause does not mean that the three patents must absolutely be sold together, but that one or more might be sold, after reasonable efforts for a reasonable time had been made to sell or dispose of them together. This construction is in full accord with the meaning which is clearly expressed in the third clause, and with which this clause must be construed.

The third clause immediately follows the second, and is as follows:—"And in case the aforesaid letters-patent, meaning either or all the said patents, shall be disposed of for a greater sum than eighty thousand dollars, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his heirs, executors, administrators or assigns, at the rate of ten per cent. or ten dollars for every one hundred dollars, over and above the said eighty thousand dollars, till the amount of such sales reaches the sum of one hundred and fifty thousand dollars, beyond which sum of one hundred and fifty thousand dollars sales the said F. G. Fowler is to receive nothing, or no further percentage."

The language of this clause is clear and admits of but one construction. After saying "the aforesaid letters-patent," it stops and defines the meaning of those words; which was not done in either of the other clauses, though a similar expression was used. "Meaning either or all the

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said patents," is its language. This makes the clause read as follows:—"And in case either or all the aforesaid letters-patent shall be disposed of," &c. What room is there for more than one construction of this clause? What foundation is there for the claim, which one of the counsel for the defendants has urged with great persistency, that the words "meaning either or all the said patents," are equivocal; that we are left to conjecture their meaning?

The words render the clause simple and easy to be understood and free from all ambiguity. There is unmistakable evidence that they were written with deliberation, and with full apprehension of their import, to prevent the claim being made, that has been made, that all the patents must absolutely be sold together. It would seem, if language is capable of debarring such a claim, that it has been done here.

Again; it will be observed in relation to the third clause, that no sale of one or more of the patents can come within its limits, unless the amount of the sale shall exceed the sum of eighty thousand dollars, in which case all that the plaintiff could be entitled to recover would be ten per cent. of the amount exceeding eighty thousand dollars and not exceeding one hundred and fifty thousand; so that, if a sale should be made of the plaintiff's patent alone for the sum of one hundred and fifty thousand dollars all that he could be entitled to recover by this clause would be ten per cent. on seventy thousand dollars. And such would be the case if the Mallory patents alone should be sold for the same amount.

But it is said that what the plaintiff would be entitled to receive under the third clause, is in addition to the eight thousand dollars that he would be entitled to under the second clause. The third clause does not so state, but doubtless it should have that construction, for any other would be absurd.

Now, if it be true, as seems to be conceded by the brief of the senior counsel for the defendants, that if the plaintiff's patent had been sold without the Mallory patents, or the

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Mallory patents sold without the plaintiff's, for the sum supposed, the plaintiff would be entitled to \$8,000 under the second clause and \$7,000 under the third clause, would he not be entitled to \$8,000 under the second clause if the amount of the sale in the case supposed should not exceed \$80,000? Clearly he would be. How could it be otherwise? A sale of one or more of the patents, for a sum exceeding \$80,000, it is conceded comes within the second clause as well as the third. How can it come within the second clause unless a sale of one or more patents may be made directly under that clause? It follows, therefore, that the sum of \$80,000 was not intended as a limitation below which no sales of patents less than the whole number could be made, but as a limitation up to which the plaintiff could not receive more than \$8,000, as the \$150,000 is a limitation above which no percentage could be recovered. The plaintiff surrendered all claim to the surplus over \$150,000 in consideration of his receiving \$8,000 under the second clause, if sales should be made at any price; thus he gave up a possible advantage in one case to counterbalance a possible loss to Mallory in the other. In order to show this clearly, the two clauses were inserted with the plaintiff's compensation for each separate and distinct. If a sale is large enough to come within both clauses, the compensations in both are to be added together. If it comes within the second clause only, then no addition to the compensation of that clause is to be made. Hence it is clear that the phrase, "meaning either or all the said patents," enters into the second clause, and determines the construction to be given to it.

The defendants' construction of the second clause is, that all three of the patents must be sold to entitle the plaintiff to anything; so that if the plaintiff's patent alone had been sold for a large amount, or if it had been found that one of the Mallory patents had been anticipated by some English patent and thereby was rendered wholly unsalable, but the other two patents had been sold together for a large amount, the plaintiff, in either case, could recover nothing under

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the contract, for strange indeed would it be that he could recover the percentage compensation of the third clause, when it is conceded by the defendants that the percentage is in addition to the compensation provided in the second clause. Manifestly such construction of the second clause never entered the mind of either party to the contract; and there should be clear and unmistakable language used in the clause to that effect before it should have that construction. Such a construction would make the plaintiff not only an insurer of the salability of his own patent, but an insurer of the salability of both the Mallory patents as well; when at the same time Mallory would run no risk in regard to the salability of either of the patents, but might be a great gainer by such a defect in some one of them, for then he could retain the entire proceeds of the sale, even if the defect was found to be in one of his own patents. There would be no mutuality in the contract upon such a construction, and the claim is clearly untenable.

Another claim is, that the plaintiff's patent must be sold, at all events, in order to entitle him to anything. This claim, likewise, makes the contract a one-sided affair, and deprives it of all mutuality between the parties. According to it, if the plaintiff's patent had been sold alone for \$150,000, Mallory would have nine times as much of the proceeds of the sale as the plaintiff, whereas if the Mallory patents had been sold alone for the same amount, the plaintiff would not be entitled to anything. This construction is untenable like the one we have considered; and both tend strongly to show that the construction we have given the second clause is correct.

The case finds that Mallory sold his patents for more than one hundred thousand dollars. How then can the defendants escape paying the amount of compensation provided in the second clause of the contract? We have seen that whatever sales come within the third clause, come likewise within the second clause; and this the senior counsel for the defense virtually admits when he concedes that one or more patents may be sold under the third clause; in

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which case, he further concedes, the compensation provided in that clause is to be added to the compensation provided in the second clause, which could not be done unless the sale comes within both clauses.

In this part of the case the defendants contend that, by the terms of the contract, Mallory was merely a bailee of the plaintiff's patent; that he took it to sell with his own, at the greatest price obtainable by the exercise of due diligence and reasonable effort, for the plaintiff's benefit; all which, it is said, the case finds that he did, and made due return of the property to the plaintiff after all reasonable efforts had failed to accomplish the object.

But in what sense can the contract be called a bailment? It is true that Mallory took the plaintiff's property to sell with his own, and was bound to return it if no sales should be made of any of the properties. But each party had an interest, and a right to share in the proceeds of all the sales that might be made of any or all the properties, as we have seen. There was a pooling of the properties for all purposes of the speculative adventure; and the proceeds of all sales were made common property, differing only in the shares which each party would be entitled to receive.

If the plaintiff's property only should be sold Mallory would share in the proceeds to the same extent that he would have done in a sale of one of his own properties for the same amount, and the share of the plaintiff would be the same in both. There would be no difference, in this respect, whichever property was sold. How then can it be said that Mallory, or the Propeller Company, (which in this case we speak of under his name) was simply a bailee of the plaintiff's patent, to sell it for his benefit, and return the same if no sale should be made?

Again; it is claimed that there is a failure of the consideration for the promise in the contract to pay the plaintiff the sum of \$8,000, should one or more of the properties be sold, and ten per cent. additional of the excess in the amount of such sales over \$80,000 and up to \$150,000, owing to the fact, as is claimed, that the Moodie patent

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rendered the plaintiff's patent unsalable by anticipating his device.

We have already considered the answer to this claim while considering whether there was any warranty of the validity, salability, utility or value of this device by the plaintiff while negotiating the contract. We there showed that what passed between the parties during the negotiations amounted to an agreement that the plaintiff not only need not warrant the validity or salability of his patent, but that Mallory would take the same running his own risk of its validity and salability. Surely he could do this, and by doing it deprive himself of the right to claim that there was no consideration for his promise on the ground that the patent was invalid when he accepted it.

And further; it will be noticed that the defect claimed is not in the device itself. There is no pretense that it would not accomplish all that was claimed for it. The defect was in the letters-patent only. Had it been inherent in the device, and the device worthless in consequence, then the claim of the defendants might be sound.

The defendants' counsel illustrate their claim by supposing that Mallory was the owner of a valuable horse and Fowler the owner of its perfect mate. The owners supposed their horses would sell together for a much larger sum than could be realized from their separate sale, and could be sold to greater advantage in England than in this country. So they made a similar contract to the one in question regarding the sale of the horses. They agreed that Mallory should take them to England and sell them together as a pair. If the horses should be so sold at any price Fowler was to receive \$500. If either or both should be sold for a greater sum than \$1,000, Fowler was to receive ten per cent. on the excess of \$1,000. Mallory went to England to perform the contract, and while engaged in trying to sell the horses together as a pair, Fowler's horse met with an accident that destroyed its value and rendered it impossible to sell it. Mallory afterwards sold his horse for

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the sum of \$1,500. The counsel asks, has Fowler any redress?

We answer that we think he would have if the facts were similar in all respects to what they are here. If the owners of the horses, in order to obtain the much larger sum that they expected to get by the sale of the horses together as a pair than could be realized by their sale in any other way, pooled their horses for the speculation, and made the proceeds of all sales of them or either of them common property to be shared by the parties in certain proportions, and it was further agreed that neither party need insure his horse from accidents of any kind, and if an injury should befall either of them it should be borne by both, it would be more like the present case. The supposed case would be more like the case in hand if, instead of the horse being rendered worthless by an injury, we should suppose that Mallory on his arrival in England found so many horses like Fowler's in every respect, with which the Mallory horse could be matched, that the number destroyed the value of the Fowler horse as a match for Mallory's, and entirely frustrated the plan of the parties for the sale of that horse with the other.

It is further said that if Mallory, after becoming satisfied that the Fowler patent could not be sold, had returned home and tendered a re-transfer of it to Fowler, he would have performed his full duty under the contract; and could then have returned immediately to England and have sold his own patents.

This could not have been done if our construction of the contract is correct. We have seen that the contract made common property of the proceeds of all sales of the patents, whether one or more should be sold. Fowler had an interest to the extent of his compensation in whatever sale might be made of the Mallory patents, and Mallory had an interest in whatever sale might be made of the Fowler patent. If Mallory had found it impossible to sell his own patents, but had sold Fowler's for \$150,000, he would have had \$135,000 of the amount and Fowler only \$15,000. Is it

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so that when he became satisfied that the Fowler patent could not be sold, but he could sell his own for a large amount, he could deprive Fowler of all right to share in the proceeds by postponing the sale till he could return home and tender a re-transfer of the Fowler patent, and then return and make his sale? We think not. We think Mallory was bound to conduct fairly and treat Fowler as he would treat himself. He was bound to sell either or all the patents, as the case might be, without discrimination, for whatever price was satisfactory to him under all the circumstances of the case.

We fully agree with the defendants, that in actions upon bonds which are given to secure, and be answerable for, the faithful performance of contracts, the plaintiff can recover no more than is equitably due. But here the breach of the bond consists in a refusal by the defendants to pay the plaintiff a sum of money due him on the contract, of which money the bond was given, among other things, to secure the payment. The amount is equitably due, not as unliquidated damages, but as a sum of money promised to be paid in the state of things that existed.

In conclusion we say that, although hardship exists in the case, it results mainly, if not wholly, from the inability of the defendants hitherto to realize the full benefit of their sale. Had Mallory received in cash the twenty-two thousand pounds sterling for which the sale was made, or had the stock of the "Mallory Propeller Company, Limited," been equal in value to what it was received for, and supposed to be worth at the time, and the remaining ten thousand pounds had been paid in cash, we doubtless should not have heard of any hardship existing in the case.

When the contract was executed, so far as any forecast of future events could be made, it would be supposed that the plaintiff would run twice the risk, at least, that some other patent or patents had anticipated and rendered unsalable one or the other of the Mallory patents, than there was that such would be found to be the case in regard to the plaintiff's patent. Mallory had not only double the number, but

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it was known at the time that there were other devices intended to produce similar results to his; but nothing of the kind was known in regard to the plaintiff's patent.

Surely the contract imposed no hardship upon Mallory. It is true he agreed to pay the plaintiff the sum of \$8,000 if either or all the patents should be sold at any price; still he was not bound to sell at any losing price. The contract left it wholly with him to say what should be the consideration of all sales he might make. "To be sold for such a sum of money as the American Propeller Company shall deem advisable," is its language. Mallory was not only secure from all loss in this respect, but he was entitled to the surplus of all sales over the sum of \$150,000. Whatever might be the amount, the plaintiff could have no more than \$15,000, nor less than \$8,000.

It is found in the case that the stock which Mallory received in part payment for the sale of his patents, never had any intrinsic value, and it is to be laid out of the case.

We advise the Superior Court to render judgment in favor of the plaintiff for the sum of eight thousand dollars, and the interest thereon from the time the amount became due.

In this opinion PARDEE and GRANGER, Js., concurred.

CARPENTER, J., (dissenting). The law favors sureties. All contracts sought to be enforced against them are to be construed with reasonable strictness in their favor. This proposition will not be denied. That it applies to this case cannot be doubted. William H. Mallory, one of the parties to the contract, contracted in fact as surety for the American Propeller Company. He, and two others who were his sureties, signed the bond given to secure the performance of the contract. William H. Mallory being dead, the suit is prosecuted against his sureties as well as against his estate. The case turns mainly on the construction of the contract.

The plaintiff was the owner of a patent, and the American Propeller Company was the owner of two other patents,

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all of which were issued by the government of Great Britain and all related to the method of steering propellers. The parties supposed that they could be sold together more advantageously than separately. Hence it was agreed that the plaintiff should assign his patent to the Propeller Company in order that the three patents might be sold to parties in Great Britain. William H. Mallory entered into a personal contract with the plaintiff, in which he undertook that the patents should be sold in one year if practicable; if not, that Fowler's patent should be re-assigned to him. By the terms of the agreement they were all to be sold together. If so sold, no matter for what sum, Fowler was to receive, as his portion of the proceeds, the sum of \$8,000. If all or either of them were sold for more than \$80,000, Fowler was to have ten per cent. of the excess up to \$150,000. Fowler's patent, without the knowledge of the parties, had been anticipated in Great Britain by the Moodie patent, for which reason it was found impossible to sell it. The other two patents, together with a steam-launch, were sold for the nominal price of £22,000 to a corporation organized in England. Of this sum there was received in cash on account of the patents the sum of \$3,625.20. The balance was paid in stock of the English corporations which the committee finds is worthless. At the expiration of the year the plaintiff's patent was re-assigned to him.

Neither the Propeller Company nor Mallory ever received any benefit whatever from the Fowler patent and the transaction occasioned no loss or damage to Fowler. Upon these facts the question is whether the plaintiff is entitled to recover.

The plaintiff claims that he is entitled to recover \$8,000 and interest, and that claim is sustained by a majority of the court. The claim appears to me so palpably inequitable and unjust that I cannot assent to it. My views are strengthened and confirmed by a careful re-examination and re-consideration of the questions involved after the decision was made. The contract, after describing the parties and the patents, and providing that the patents shall be sold

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together, is as follows: "And in case said letters-patent are so sold, leased or disposed of at any price within the time aforesaid, then the said Mallory, his heirs, executors, administrators, or assigns, are to pay to the said Fowler, his executors, administrators, heirs or assigns, the sum of eight thousand dollars, within six months after the date of such disposal or sale. And in case the aforesaid letters-patent, meaning either or all the said patents, shall be disposed of for a greater sum than eighty thousand dollars, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his heirs, executors, administrators or assigns, at the rate of ten per cent., or ten dollars for every hundred dollars, over and above the said eighty thousand dollars, until the amount of such sales reaches the sum of one hundred and fifty thousand dollars, beyond which sum of one hundred and fifty thousand dollars sales the said F. G. Fowler is to receive nothing, or no further percentage." The contract then provides that in case the patents are not disposed of Fowler's patent shall be returned to him, and that he shall suffer no loss or damage on account of the agreement.

Under this contract one of three results was possible: 1st, a sale of all the patents; 2d, a sale of none of them; and 3d, a sale of one or two of them without the other or others. The first contingency is provided for; a sale of all for any price entitles the plaintiff to \$8,000. The second—a sale of none of them—entitles the plaintiff only to a re-assignment of his patent. The third—a sale of two of them, not including the plaintiff's, has actually happened. Now what is the provision of the contract in that contingency? Simply that the plaintiff shall receive ten per cent on the amount received in excess of \$80,000. But the plaintiff recovers nothing under that clause in the contract, because the amount actually received for the patent sold is but a little more than three thousand dollars.

Will this contract bear such a construction as to give the plaintiff the sum of \$8,000 provided for in the first clause? I think not. This was not a "pooling" of the patents, as

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I understand the meaning of that term. Neither party became interested as owner in the patent or patents of the other. The proceeds were not to be divided *pro rata*. The plaintiff was first to be paid \$8,000 provided all the patents were sold. There was a possibility that all would not bring more than that sum. No matter, the plaintiff takes the whole. Again, it was possible that all might sell for \$150,000 or more. In that event the plaintiff was to receive \$15,000; and that was to be the maximum of his compensation. All over that sum, or all over \$8,000, as the case might be, belonged to the American Propeller Company. That company received the plaintiff's patent simply as bailee. And it is from that point of view that this contract is to be considered. Now these defendants have a right to insist that this contract shall be literally and strictly construed. Construing it according to its plain, unambiguous terms, \$8,000 is payable *only* in case all the patents are sold. That being so, the plaintiff is necessarily precluded from receiving that sum if all are not sold. Moreover, a sale of any, less than all, is a contingency expressly provided for in the second clause; and as the sum of \$8,000 is not therein named it is excluded by implication. The plain obvious meaning is, that if all the patents are sold, or, possibly, if a part only, including the plaintiff's, are sold, the plaintiff is to receive \$8,000. If all or any of them are sold for more than \$80,000, he is to receive ten per cent on the excess. There is no excess and his patent has not been sold. Before he can receive \$8,000 it is indispensable that his patent should be sold. The consideration for the promise to pay him that sum is, not the right, or the power to sell, nor both combined, but a sale and the receipt of the price. The promise is necessarily contingent. Until there is a sale, with a right at least to receive the price, the promise does not take effect. As that has never happened and cannot happen the promise is inoperative. There is a total failure of the anticipated consideration.

Take another view. When this contract was entered into both parties assumed and believed that Fowler's patent

was not only valid, but that it had a clear field unobstructed by any conflicting patent. The existence of the Moodie patent was then unknown. It turns out that the existence of that patent renders the plaintiff's worthless. It is very clear that the parties were mutually mistaken. They contracted with reference to something which they supposed existed, but which practically did not exist. It is very much like a contract for the sale of a horse which they supposed to be alive, but which in fact was dead; or a ship at sea which the parties supposed to be safe, but which in fact was lost. In such cases the contract is inoperative because the parties were mutually mistaken as to the existence of a material fact. In that view of the case the plaintiff ought not to recover.

Upon what theory then are the defendants held liable? Solely on the ground that Mallory, after he had discovered that it was impossible to sell the plaintiff's patent at any price, sold his own on the best terms he could. And that ground is only rendered tenable by injecting into the second clause of the contract the provision for the payment of \$8,000, when the parties had not only failed to put it there but had carefully excluded it. I submit that such a construction falls but little, if any, short of making a contract for the parties.

We judge of principles and policies by practical results. Let us apply that test to the two constructions of this contract. Construed as I construe it, no injustice is done to either party. The plaintiff has had the benefit of an honest and intelligent effort to sell his patent in a foreign country, without trouble or expense to him. The effort failing, his patent has been restored to him in as good condition as it was when he parted with it; while the Propeller Company has only had, as was its right, the avails of its own patents. Both parties doubtless suffered by the existence of the Moodie patent, but neither is held responsible to the other therefor. A contingency arose which the parties had not contemplated and for which they had made no provision. My construction leaves them where they left themselves,

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and where the law leaves them, with no contract governing the case. The construction which prevails, by a forced and unnatural interpretation applies the contract to that contingency. It in effect interprets the contract as if it contained a clause in substance like this: "If it shall so happen that Fowler's patent is worthless by reason of the existence of another patent, so that it is impossible to sell it, nevertheless if the Propeller Company shall sell its own patents, it shall pay to Fowler the sum of \$8,000." It makes the whole loss resulting from the unexpected contingency fall upon the Propeller Company, while the plaintiff bears no part of it. He is in fact in as good a condition apparently as he would have been if the Moodie patent had not existed. It in effect prohibits the company from selling its own patents except upon a forfeiture of \$8,000 to Fowler. It makes Mallory to that extent guarantee that Fowler's patent shall be salable and valuable. By some mysterious, I may say miraculous legal transformation, Fowler's patent, the worthless one, is worth more than the three patents combined; for Mallory is compelled to pay more than double the sum he was able to obtain for all of them. Surely a construction which can work out such results must be radically wrong.

In this opinion LOOMIS, J., concurred.

THE CITY SAVINGS BANK *vs.* GEORGE HOPSON AND
OTHERS.

A negotiable note payable in six months and endorsed by the payees was delivered by the latter to a savings bank as collateral security for a loan previously made, with the following indorsement upon it, signed by the indorsers:—"We hereby acknowledge the receipt of notice of protest on the within note." Held that the word "protest" included all acts necessary to hold indorsers, and that the legal effect of the acknowledgment was to release the bank from all obligation to make demand of payment or give notice of non-payment.

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58	453
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Another note delivered to the savings bank at the same time and for the same purpose, was on demand and indorsed as follows:—"For value received we guarantee the within note till paid." Held to be an absolute and unqualified contract of the signers of the guarantee, to pay the note if the maker did not, without demand on the maker or notice of non-payment.

The maker of the note, a manufacturing corporation of which the indorsers and guarantors were stockholders, was solvent at the time the notes were given, and remained so for a year and a half from that time, but then became insolvent and so remained. The savings bank had taken no legal steps for the collection of the notes, and the other parties had not requested it to do so, or taken any measures themselves for their collection. Held that the savings bank was not to be charged with the loss.

[Argued October 28th—decided December 14th, 1885.]

ACTION upon a note; brought to the Superior Court. Facts found and case reserved for advice. The case is sufficiently stated in the opinion.

J. S. Beach and *D. F. Hollister*, for the plaintiff.

A. S. Treat and *C. Sherwood*, for the defendants.

PARDEE, J. On January 13th, 1876, the defendants Hopson, Wilmot, Clarke and Waller, for value received executed and delivered to the plaintiff their joint and several promissory note for \$20,700, payable on demand, with interest semi-annually on the first days of January and July in each year in advance. In pursuance of an agreement then made, on April 4th, 1876, the plaintiff received from Clarke and Wilmot, by way of collateral security for the note, two notes, one for \$4,950, payable on demand, the other for \$5,050, payable six months from date, both dated March 3d, 1876, made by the *Ætna Spring & Axle Company* to the order of Wilmot and Clarke, indorsed by the payees, guaranteed by O. P. Lewis and William H. Wilson. Partial payment of the note for \$20,700 has been made. The suit is for the unpaid balance.

It is the claim of the defendants that when the collateral notes matured the plaintiff neither made demand upon the

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maker, nor notified the indorsers, nor enforced payment; that then all parties to the notes were solvent and could have been compelled to pay; and that the amount due upon the notes having been lost by the negligence of the plaintiff, the law indorses this amount as a payment upon the principal note. But when the note for \$5,050 was delivered to the plaintiff, there was written upon it as follows:—"I hereby acknowledge the receipt of notice of protest on the within note;" and this was signed by all of the indorsers thereon. Herein the word "protest" includes all acts necessary to hold indorsers, and the legal effect of the acknowledgment is to release the plaintiff from any obligation to make demand, or give notice. 2 Daniel on Neg. Ins., §§ 1094-5; *Emery v. Hobson*, 62 Maine, 578; *Woodman v. Thurston*, 8 Cush., 157.

Upon the note for \$4,950 there was written as follows:—"For value received we guarantee the within note until paid;" and this was signed by Lewis, Wilson, Clarke and Wilmot, the only names upon the note other than that of the maker. This was an absolute and unqualified contract by each of the signers to pay the note if the maker did not. Upon non-payment at maturity it became and has since continued to be their duty to go to the holder and pay it, and this without demand or notice. *Breed v. Hillhouse*, 7 Conn., 523.

It results, therefore, that no party to either note was released from liability thereon by reason of any omission to act on the part of the plaintiff.

Again, the receipt given by the plaintiff to Wilmot and Clarke, setting forth the terms upon which it received the notes in question, covered other notes by the same maker, some having the same, others different, indorsers. In this receipt the plaintiff is careful to say that by the acceptance of the notes as collateral security there is to be "no release from the joint and several note; all are to be held." This provision is without force unless it is to be understood as meaning that the plaintiff in receiving them should not jeopardize its hold upon the makers of the principal note by

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coming under any obligation to demand payment, notify indorsers or commence suit. Only this, that it should not act in intentional bad faith nor hinder the pledgors in enforcing payment. The contract has been interpreted by the act of the other parties to it. As to some of the other notes covered by it, they took the initiative in, and assumed the control and expense of, legal proceedings to compel payment. With knowledge during more than a year that the notes had matured and were unpaid, that the maker was solvent and had sufficient personal property exposed to attachment, they made no demand upon the plaintiff, either that it should commence suit or permit them to do so; and there was no evidence tending to show that it was not during that time ready and willing to allow them to enforce payment. Therefore, by the terms of reception of the collaterals, it was under no legal obligation, at its own expense, without request, to enforce payment.

Again; the finding is, that as between the defendants themselves it was the duty of each to pay one fourth of the principal note. Upon the collateral notes Clarke and Wilmot were first, Lewis and Wilson second indorsers. If the plaintiff had enforced payment against the latter, they in turn would have enforced it against the former, and if these last had in this manner paid more than their half of the principal note, they would have recouped from Hopson and Waller. The record does not therefore make it certain that the inaction of the plaintiff in this regard has imposed any additional burden upon either of the defendants.

Moreover, Wilmot, Wilson and Clarke, three of the defendants, were stockholders of the *Ætna Spring & Axle Company* during the years 1876 and 1877; Wilmot and Wilson were directors; Wilmot was first its treasurer and then its president; and Wilson was its treasurer during a part of that time. All of the defendants knew, at the maturity of the notes and ever afterward, that they were unpaid. After maturity, Hopson and Wilmot informed Middlebrook, the plaintiff's treasurer, that Wilmot had heard that

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the personal property of the Spring & Axle Company was being carried off and disposed of, and asked him if something could not be done to collect the note. It is found that this was not intended or understood by any of them to be a demand to proceed to collection, but only an expression of desire on the part of Hopson and Wilmot that something might be done by way of collection. The plaintiff did not attempt to force payment by legal process.

Up to about December 1st, 1867, the Spring & Axle Company continued solvent and able to pay the notes, and up to about April 1st, 1867, had personal property sufficient in amount to pay them exposed to attachment. It became wholly insolvent about December 1st, 1877. At, and for a considerable time after, the maturity of the notes, O. P. Lewis and Wilson were the principal owners of the stock of the Spring & Axle Company, and at the maturity of the notes that stock was worth forty dollars per share.

The defendants knew that the notes were not paid at maturity, and that the plaintiff did not then resort to legal process. During the year following they refrained from requesting it to enforce them, and neglected to avail themselves of their own right to do it, although enforcing similar notes under the same pledge. There was no evidence that the plaintiff was not at all times willing to permit them to enforce these notes; and it was at all times ready to deliver the notes to them upon payment of the principal note, so far forth as that note was concerned. Even if delay should be imputed to the plaintiff in not commencing suit at maturity, there remained to the defendants ample knowledge, power and opportunity, and with these went the legal duty, to make the delay harmless and protect themselves from any loss. Not availing themselves of these the negligence became their own.

The Superior Court is advised to render judgment for the plaintiff for the unpaid balance of the note for \$20,700.

In this opinion the other judges concurred.

Trubee v. Wheeler.

53 458
58 432**HARRIET A. TRUBEE vs. ELONZO S. WHEELER AND
ANOTHER.**

An action for the conversion of personal property was brought four months after the conversion and the converted property attached in the suit. Afterwards a statutory bond was substituted for the attachment, by which the obligors bound themselves that, if the defendant did not pay the judgment that should be recovered, the obligors would pay the value of the property at the time of the attachment, not exceeding the amount of the bond. Afterwards a part of the property was returned by the defendant. In the suit the facts were found by a committee, who reported the value, at the time of its conversion, of the property not returned, and the amount of damage done to the property returned, and judgment was rendered for those sums. In a suit afterwards brought on the bond, to recover the value of the property not returned, it was held that the report of the committee in the original suit was not admissible against the obligors, except for the purpose of showing the fact of the judgment; not being admissible for the purpose of showing the value of the property at the time of the attachment—(1st) because it found the value at the time of the conversion only, which was four months before the attachment, and (2d) because the defendants were not parties to that suit and it was therefore *res inter alios acta*.

[Argued October 29th—decided December 18th, 1835.]

ACTION on a statutory bond, substituted for an attachment of personal property; brought to the Superior Court and tried to the jury before *Stoddard, J.* Verdict for the plaintiff, and appeal by the defendant Wheeler. The case is sufficiently stated in the opinion.

A. S. Treat and *G. Stoddard*, for the appellant.

W. K. Seeley and *H. S. Sanford*, with whom was *D. C. Birdsall*, for the appellee.

CARPENTER, J. It appears that, on the 3d day of April, 1874, one Georgia V. Alden converted to her own use a large amount of personal property belonging to the plaintiff. On the 29th day of July following the plaintiff commenced

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an action of trover to recover the value of the property so converted, and attached the property itself—whether all or a part only does not appear. In February, 1875, the attachment was dissolved by substituting for it the bond in suit. In June, 1877, a portion of the property was returned to the possession of the plaintiff. In March, 1880, the plaintiff recovered judgment in the action of trover for the value of that portion of the property which was not returned, and which was found to be, at the time of its conversion, \$8,813.33; and for the damage to the property which was returned, which was estimated at \$7,276.26. These two sums, with interest, made up the amount of the judgment.

The judgment was not paid, and this suit was brought. On the trial the plaintiff offered in evidence the report of the committee in the action of trover. The defendant objected to its admission, but the court admitted it, only for the purpose of showing the foundation of the judgment and fixing the amount thereof. The court expressly held that it was inadmissible for the purpose of showing the damage to the property which was returned, but seems to have admitted as showing, or in some way tending to show, the value of the property which was not returned. That was the real question in this part of the case.

The action is on a penal bond given to secure the performance of a condition therein named; that is, that the said Georgia V. Alden should pay the judgment recovered against her, and, in default thereof, that the obligors should pay the value of the property attached at the time of its attachment. The plaintiff, if entitled to recover, is only entitled to recover such value. The pleadings present this issue as follows:—The plaintiff alleges that a portion of the property was returned in a damaged condition, and that the balance was worth \$8,813.33 at the time of the attachment. The defendant neither admits nor denies the return of the property or the damage thereto, but leaves the plaintiff to prove the same, but the allegation as to the value of the balance is denied. The burden therefore is on the plaintiff to prove the value as alleged. As the case is pre-

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sented to us, no evidence was offered on that point except the report of the committee; and as that was received for another purpose only, there seems to have been no evidence before the jury to sustain this allegation. In this state of things the court told the jury that the bond was "*prima facie* evidence of the fact that the property in question was the property of the original defendant, and, by fixing the sum of \$14,000, fixes *prima facie* that amount as the actual value of the interest of the defendant in the original suit." If it be true in any sense that the bond was *prima facie* evidence of value, obviously it was *prima facie* evidence of the value of the whole property, including that which was returned as well as that which was not, and could not be *prima facie* evidence of the value of either portion of it. The bond when taken could have had no reference to a subsequent division of the property. The charge, therefore, was not adapted to the case, and was not what the pleadings required.

Assuming, but for our present purpose only, that the bond was *prima facie* evidence of the value of the whole property attached, yet it was necessary to go one step further in order to prove the allegation in the complaint, and prove the value of that portion of the property which was not restored to the plaintiff, either directly or indirectly, by proving the value of that which was returned and deducting it from the amount named in the bond. There seems to have been no such proof. But the court, after rejecting the report as evidence of the value of the property returned, or the damage to it, turned its attention to the value of that part which was not returned. And here, so far as we can discover from the record, the court must have adopted one of two alternatives; either it accepted the allegation in the complaint as to value as true, without proof, and notwithstanding the denial of the defendant, or else it treated the report as evidence of such value. If the former, the error is apparent without argument; if the latter, although not so obvious, still the error exists; for we are of the opinion that the report was not admissible on the question of value.

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It was strictly *res inter alios*. The defendant was neither party nor privy to that proceeding, except that he could not controvert the judgment, and could not deny that the property was worth, when converted, the sum named, for that fact was essential to the judgment rendered. But the question now is, what was the value of the defendant's interest in the property when it was attached? The former judgment neither proves, nor tends to prove legally, the value at that time.

Moreover, the report purports only to show the value of the property when converted, April 8d, 1874; it does not even tend to prove that the same property, nearly four months later, was worth just the same sum.

We deem it unnecessary to consider the other questions in the case.

For the reasons given the judgment must be reversed and a new trial ordered.

In this opinion the other judges concurred.

WILLIAM NOLAN *vs.* THE NEW YORK, NEW HAVEN &
HARTFORD RAILROAD COMPANY.

JOHN NOLAN, ADMINISTRATOR OF DANIEL NOLAN, *vs.*
THE SAME.

The question of negligence is a mixed question of law and fact. Where the court requires of a defendant some act which the law did not require, it is an error of law and can be reviewed. Where the court finds that the defendant failed to do some required act, it is a finding of fact and cannot be reviewed.

A railroad company should always be vigilant to prevent accidents, but owes no duty, as such, to run its trains so as to prevent accidents to persons unnecessarily and unlawfully on its tracks.

But the law requires of a company that the engineer in charge of a train shall, after the danger of an accident is discovered, do all he can to prevent it.

A railroad company is not bound, in the absence of any statutory require-

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60	377

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62	507

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63	17
63	153

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65	230

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68	218
68	356
68	487

53	461
69	370

58	461
72	85

53	461
76	682
76	694

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ment, to fence its road in such a way as to keep children from getting upon its tracks.

The fact that a child is but seven years of age does not create a duty towards him on the part of the company that would not otherwise have existed. Precautionary measures, having for their object the protection of the public, must as a rule have reference to all classes alike.

Combined facts do not make a case of negligence where each fact by itself does not involve a neglect of duty.

The care which a plaintiff must have exercised to be free from the imputation of contributory negligence, is reasonable care, which is that degree of care which may reasonably be expected from a person in his situation.

On a hearing in damages after demurrer overruled, in a suit for an injury by the defendant's negligence, the admission of the demurrer has no effect as evidence, but exhausts itself in throwing upon the defendant the burden of proving that he was not guilty of negligence, or that the plaintiff was guilty of contributory negligence; and either may be shown by a mere preponderance of evidence, the question standing, as in any other case, upon the proof alone.

[Argued October 30th—decided December 14th, 1885.]

TWO ACTIONS for injuries from the negligence of the defendants in the running of one of their trains, brought to the Superior Court, and tried together to the jury before *Stoddard, J.*

One of the plaintiffs was William Nolan, who was seriously injured by being struck by the locomotive of the defendants' train, and the other was John Nolan, administrator of the estate of Daniel Nolan, who was killed by the same accident.

The defendant demurred, and the demurrer was overruled and the case heard in damages before *Stoddard, J.*, who made a finding of the facts, and rendered judgment for \$1,500 damages in the case of William Nolan, and for only nominal damages in the case of Daniel Nolan. The defendants appealed to this court in the former case and the plaintiff in the latter. The facts are sufficiently stated in the opinion.

H. S. Sanford and *M. W. Seymour*, for the defendants.

1. Negligence is a mixed question of law and fact. The court has repeatedly so held. *Dimock v. Town of Suffield*,

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30 Conn., 129; *Knight v. Goodyear Glove Manf. Co.*, 38 id., 438; *Strouse v. Whittlesey*, 41 id., 559; *Parker v. Union Woolen Co.*, 42 id., 399; *Peck v. N. York, N. Hav. & Hartford R. R. Co.*, 50 id., 379. Negligence is a failure to discharge a legal duty. *Phila. & Reading R. R. Co. v. Hummell*, 44 Penn. St., 375; *Shearm. & Redf. on Neg.*, § 2; *Wharton on Neg.*, § 1. So far as negligence is found by the court below, the question can be reviewed on error if the court held the defendant to a duty which the law did not impose.

2. The defendant was not guilty of negligence on the facts detailed in the finding. It is found that when the danger of an accident was discovered everything possible was done to prevent it. Less than seven seconds before the accident the engineer saw the boys start to run down from a perfectly safe place towards the engine. The defendant was not bound to so fence in its road as to exclude children; it would have been impracticable. No statute requires it, and such a requirement would not be reasonable. And the defendant was not bound to run its trains slowly along this part of its track, in which the public had no right of passage. Its only duty was not to act with recklessness or gross carelessness. *Blyth v. Topham*, Cro. Jac., 158; *Terre Haute, &c. R. R. Co. v. Clark*, 73 Ind., 168; *Chicago, Burl. & Quincy R. R. Co. v. Harwood*, 80 Ill., 88; *Bemis v. Conn. & Pass. River R. R. Co.*, 42 Verm., 375; *Grows v. Maine Central R. R. Co.*, 67 Maine, 100; *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 372; *Johnson v. Boston & Maine R. R. Co.*, 125 Mass., 75; *Morrissey v. Eastern R. R. Co.*, 126 id., 377; *Wilds v. Hudson River R. R. Co.*, 24 N. York, 430; *Bulger v. Albany Ry. Co.*, 42 id., 459; *Warner v. N. York Central R. R. Co.*, 44 id., 469; *McKenna v. N. York Central R. R. Co.*, 8 Daly, 304; *Phila. & Reading R. R. Co. v. Hummell*, 44 Penn. St., 375; *Gillespie v. McGowan*, 100 id., 144; *Maher v. At. & Pacific R. R. Co.*, 64 Misso., 267; *Peck v. N. York, N. Hav. & Hartford R. R. Co.*, 50 Conn., 392; *Lygo v. Newbold*, 9 Exch., 302; *Binks v. So. Yorkshire Ry. Co.*, 3 Best & Smith, 244; *Singleton v. Eastern Counties Ry. Co.*, 7 Com. B., N. S., 287; *Hounsell v. Smith*, id., 731.

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The law does not require any one to presume that another may be negligent or a wrong-doer. *Reeves v. Del., Lack. & Western R. R. Co.*, 30 Penn. St., 454; *Brown v. Lynn*, 31 id., 510.

3. The age of the boy William was not a reason why he could not be guilty of contributory negligence. *Singleton v. Eastern Counties Ry. Co.*, 7 Com. B., N. S., 287; *Phila. & Reading R. R. Co. v. Hummell*, 44 Penn. St., 375. If he was too young to be able, as matter of law, to contribute to his own injury, the negligence of his mother in sending him across the track and in allowing him to play about the track, was in law his negligence and will prevent a recovery. *Hartfield v. Roper*, 21 Wend., 615; *Wright v. Malden & Melrose R. R. Co.*, 4 Allen, 288; *Callahan v. Bean*, 9 id., 401; *Ewen v. Chicago & N. Western R. R. Co.*, 38 Wis., 613, 628.

4. The court did not apply the correct rule with regard to the effect of the demurrer upon the question of the negligence of the defendant. It treated the admission as evidence in the case and as such to be overcome by the defendant's evidence. The utmost effect of it was to put upon the defendant the burden of proof upon the question whether it had used due care. *Crane v. Eastern Transportation Line*, 48 Conn., 361.

R. E. DeForest, for the plaintiffs.

1. The court below finds that William Nolan suffered injuries to the extent of \$1,500. This judgment must stand unless the court can see, from the facts found, that the defendant was free from negligence or the plaintiff guilty of contributory negligence. The admission of the demurrer imposed upon the defendant the burden of proving one or the other of these points. *Crane v. Eastern Transportation Line*, 48 Conn., 361. It would not be enough if the court had not found negligence in the defendant; there must be a positive finding, or a necessary legal inference from the facts found, that the defendant was free from negligence or the plaintiff guilty of it.

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2. The court has not found any such fact, and this court cannot, upon the facts found, infer as matter of law that the defendant was not guilty of negligence or that the plaintiff was guilty of contributory negligence. On the contrary the facts clearly show gross and even criminal negligence in the defendant in the running of its train. In the case of *Daley v. Nor. & Wor. R. R. Co.*, 26 Conn., 591, this court held that it was negligence in the defendant to run a train at the rate of from five to eight miles an hour through the city of Norwich, twenty-five years ago, when it was a comparatively small town, and that on a right of way completely walled in, and where no general and customary use of the track by the traveling public was shown. "Indeed," says the court, "we think that locomotives with trains of cars attached should not be allowed to pass through the inhabited parts of our cities with such force or speed as to be incapable of immediate and absolute control, and even then not without special care to see that the track is all clear in its curves and more difficult places." At the place of the accident the defendant had laid out its double track through a thickly settled portion of a city of thirty-five thousand inhabitants, immediately between and adjoining two of the highways and principal thoroughfares of that city, and over these tracks it was running in opposite directions at least fifty-two trains of cars every day. Now, a single train of cars is, of itself a highly dangerous thing, however slowly it may be moving, and to propel it at the most moderate speed in a place comparatively unfrequented, where however children and even adults would be likely to come in unsafe proximity to it, without taking every precaution that human foresight and skill could suggest and provide to prevent accident, would upon principles of the common law be condemned as actionable carelessness. *Lynch v. Nurdin*, 1 Q. B., 29; *Clark v. Chambers*, L. R., 3 Q. B. Div., 339; *Railroad Co. v. Stout*, 17 Wall., 657; *Johnson v. Hudson River R. R. Co.*, 20 N. York, 65; *Hydraulic Works Co. v. Orr*, 83 Penn. St., 332; *Keefe v. Milw. & St. Paul R. R. Co.*, 21 Minn., 207; *Whirley v. Whiteman*, 1 Head, 610; *Birge v. Gardiner*, 19 Conn. 507.

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For the defendant to fence its tracks at the place of the accident would have been a simple and inexpensive precaution, and upon the plainest principles of the common law, it was its obvious duty; and its neglect to do this, in the absence of any statute, would have been culpable negligence. *Pierce on Railroads*, 409; *Isbell v. N. York & N. Haven R. R. Co.*, 27 Conn., 393, 403; *Quimby v. Vermont Central R. R. Co.*, 23 Verm., 387; *Trow v. Vermont Central R. R. Co.*, 24 id., 487; *Kerwhacker v. Cleveland, Col. & Cin. R. R. Co.*, 3 Ohio St., 199; *Smith v. Milw. & St. Paul R. R. Co.*, 23 Wis., 186; *In re Rens. & Saratoga R. R. Co.*, 4 Paige, 553. But at the time of the accident a statute required such fencing. Gen. Stats., p. 326, sec. 42, repealed in 1881. See Acts of 1878, ch. 51, and Acts of 1881, ch. 66. In defiance, therefore, of both common law and statutory obligations the defendant left its tracks so running through this populous district, entirely unfenced, and with no barrier whatever separating the highway from the tracks. As a natural consequence the public had overlooked the distinction between the railroad's right of way and the general right of way, and (in the language of the finding) "all parts of the right of way of the defendant company lying contiguously to said streets were, at the time of the accident, and for many years prior thereto had been, very largely and generally used by the public for passing and repassing on foot, at pleasure, in all directions. But this was not all. With full knowledge of this unfenced condition of its tracks and of this public use, well knowing that, at all hours men, women and children would be thronging this part of its right of way, the defendant drives its engine and train through it at the rate of eighteen miles an hour, and with such momentum that it could not be stopped, with all the force of hand-brakes and air-brakes, until it had gone a distance of nearly eight hundred feet. Beyond all this, the defendant had so laid its tracks and arranged the running and meeting of the trains at this point, that the engineer was required to be on the other side of the engine, and actually, on the side of the track where the accident happened, there was

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no lookout whatever to avert accident. Moreover, the fact that the two trains met here, rendered the signals of the train from the east practically useless. If all these circumstances combined do not constitute a case of negligence, gross and criminal, beyond all possibility of evasion or excuse, it is difficult to imagine what negligence is. The authorities seem to agree as to the negligence involved in such conduct. *Continental Improvement Co. v. Stead*, 95 U. S. Reps., 164; *New Jersey Railroad & Transp. Co. v. West*, 32 N. Jer. Law, 91; *Phila. & Reading R. R. Co. v. Long*, 75 Penn. St., 265; *Phila. City Ry. Co. v. Hassard*, id., 367; *Penn. R. R. Co. v. Lewis*, 79 id., 33; *Wilds v. Hudson River R. R. Co.*, 29 N. York, 326; *Massoth v. Del. & Hudson Canal Co.*, 64 id., 524; *Cordell v. N. York Central R. R. Co.*, 70 id., 124; *Toledo, &c. R. R. Co. v. Foster*, 43 Ill., 413; *Kerr v. Forgue*, 54 id., 484; *Chicago & Alton R. R. Co. v. Gregory*, 58 id., 226; *Toledo, &c. R. R. Co.*, 71 id., 346; *Chicago & Alton R. R. Co. v. Murray*, id., 601; *Chicago, &c. R. R. Co. v. Becker*, 84 id., 484; *Wabash, &c. R. R. Co. v. Hencks*, 91 id., 412.

3. Neither of the plaintiffs was guilty of contributory negligence. The court has found that William Nolan was not, and this is conclusive as to him, as the court finds it as a fact and the question as here presented is one of fact. *Beers v. Housatonic R. R. Co.*, 19 Conn., 566; *Park v. O'Brien*, 23 id., 346; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 id., 284. As to Daniel the court finds contributory negligence, but in this case not as a fact, but as an inference from the facts. The court says: "I am of opinion, and therefore find upon said facts, that he was contributorily negligent." The finding may therefore be reviewed; and as the burden of proof is on the defendant to show such negligence, the court is to reverse the judgment unless the facts are such as require the inference that there was such negligence. So far from this, the facts show that there was none. It clearly is not negligence for a child of ten years to be so near a railroad track as to be struck by the engine. And it clearly does not constitute negligence

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for a child or indeed any person to be upon an open part of the track, passed over by the public, between two streets of a city, even if technically a trespasser. *Birge v. Gardiner*, 19 Conn., 507; *Daley v. Nor. & Wor. R. R. Co.*, 26 id., 591; *Isbell v. N. York & N. Haven R. R. Co.*, 27 id., 893; *Woolf v. Chalker*, 81 id., 121; *Railroad Co. v. Stout*, 17 Wall., 657. But persons passing along such a place are not to be regarded as even technically trespassers. *Ill. Central R. R. Co. v. Hammer*, 72 Ill., 347; *Kay v. Penn. R. R. Co.*, 65 Penn St., 269; *Penn. R. R. Co. v. Lewis*, 79 id., 33; *Dublin, &c. Ry. Co. v. Slattery*, L. R., 8 App. Cas., 1155.

4. But the youth of the plaintiffs renders it impossible for the court to say, as matter of law, that they were negligent. The rule as to persons of mature years is not to be applied to them. It is a question wholly of fact whether such children are, in the particular case, of sufficiently mature judgment to use ordinary care, and whether that degree of care was used which persons of that age would ordinarily exercise. *Birge v. Gardiner*, 19 Conn., 507; *Daley v. Nor. & Wor. R. R. Co.*, 26 id., 591; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 id., 284; *Lovett v. Salem & So. Danvers R. R. Co.*, 9 Allen, 557; *Lynch v. Smith*, 104 Mass., 56; *Oldfield v. N. York & Harlem R. R. Co.*, 14 N. York, 314; *Drew v. Sixth Av. R. R. Co.*, 26 id., 51; *O'Mara v. Hudson River R. R. Co.*, 38 id., 445; *Ihl v. Forty-second St. R. R. Co.*, 47 id., 317; *Thurber v. Harlem Bridge, &c. R. R. Co.*, 60 id., 326; *Byrne v. N. York Central R. R. Co.*, 83 id., 620; *Dowling v. N. York Central R. R. Co.*, 90 id., 670; *Robinson v. Cone*, 22 Verm., 225; *Phil. & Reading R. R. Co. v. Hassard*, 75 Penn. St., 367; *Kerr v. Forgue*, 54 Ill., 484; *Chicago & Alton R. R. Co. v. Gregory*, 58 id., 226; *Same v. Murray*, 71 id., 601; *Same v. Becker*, 84 id., 484; *Railroad Co. v. Gladmen*, 15 Wall., 406; *Railroad Co. v. Prout*, 17 id., 657; *Lynch v. Nurdin*, 1 Queen's Bench, 29; *Bilbee v. London, &c. Ry. Co.*, 18 Com. B., N. S., 590.

CARPENTER, J. The facts common to both cases are

briefly these:—Daniel and William Nolan were children of John and Mary Nolan, of the ages of ten and seven respectively, and lived with their parents at Bridgeport. They were ordinarily intelligent, and had the use of all their faculties. East Main Street in Bridgeport crosses the defendant's double track railroad at nearly right angles. East Washington Street, on the north of the tracks, for about two hundred feet west of the crossing, lies alongside of the tracks, while Crescent Avenue, on the south of the tracks, lies alongside for a much greater distance westward. West of the crossing the tracks lie nearly level with the surface of Crescent Avenue for the entire distance. On the north, towards East Washington Street, there rises a bank which, at the place of the accident, was about five and one half feet high above the railroad gutter. The slope of the bank is wholly within the limits of the right of way of the railroad company, that right extending some six feet further north than the crest of the bank. The crest is level with the surface of East Washington Street. This locality is a thickly populated district of the city, and all parts of the defendant's right of way lying contiguously to these streets were, at the time of the accident, and for many years prior thereto had been, very largely and generally used by the public for passing and repassing on foot at pleasure and in all directions. The defendant was at all times familiar with such use. The two children who were injured had lived in this vicinity for some time, and were familiar with this public use of the defendant's right of way. There was and had been no fence or other barrier or obstruction, except the bank and the ordinary railroad gutter, between the railroad tracks and the street and avenue.

The place of the accident is about one hundred and fifty feet west of East Main Street crossing. On the 15th day of October, 1880, the mother sent the two children to a drug store to make a small purchase, directing them to hurry home. They went directly to the store, crossing the railroad at East Main Street crossing, made the purchase, and started to return home, when their attention was drawn

to some other children a little west of the drug store at or near the crest of the bank, and on or near the right of way of the defendant. Thereupon they crossed the street and joined the other children, and remained standing there a minute or two, doing nothing except to speak to the children. At this time the express train from New York was due, and came from the west on the south track, giving the usual signals. The train from New Haven was due, and came from the east on the north track. The rear car of the east bound train crossed East Main Street as the engine of the west bound train came to the crossing. It is found that "the attention of these two children was attracted and fixed upon the train from the west, and just after it had passed the place of the accident William started to go home diagonally across the railroad track and right of way, and ran down the slope of the bank towards the tracks. Daniel immediately followed William, running down the bank but a little to the east of William. The children had not quite reached the north rail of the north track when the piston barrel or the bunter of the engine of the train from the east struck Daniel, inflicting such injuries that he died from the effects thereof four days thereafter. William was struck either by some part of the engine, or Daniel was, by force of the blow given him, thrown violently against him." William was seriously injured. The engineer of the train from New Haven gave the usual signal, and no negligence in that regard is complained of.

The place of the accident was not at any regular street crossing, but was about one hundred and fifty feet west of East Main Street. There is a considerable curve in the tracks, making a southerly concave easterly from the place of the accident for some six hundred or more feet.

The engineer, as he approached East Main Street crossing, stepped from the north side of the engine over to the south side to watch the crossing for persons coming from the south, as his engine was coming to and about to cross the highway, just as, or immediately after, the rear of the train from New York was passing or had passed over the

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crossing. For this purpose he remained on the south side of his engine until he got to the crossing, when he returned to the north side, and then saw the boys running down the bank. No complaint is made that he did not then do all that was possible to be done to avoid the accident.

The finding continues as follows:—"I find that neither of the children had his attention drawn to the train from New Haven; they did not see or hear it or know of its approach until immediately before the accident, nor until it was impossible for them to avoid the collision. And I am not able to find whether they knew of the approach of the train from New Haven until they were struck."

The train was moving about eighteen miles an hour. At that time about fifty-two trains passed the place of the accident during each twenty-four hours.

Upon these facts the court below held that the defendant was liable to Daniel for nominal damages only, and to William for substantial damages. The plaintiff appealed in the former case, and the defendant in the latter.

Two questions arise in each case:—Was the defendant guilty of negligence? Was the plaintiff guilty of contributory negligence? The court below held that the defendant was negligent; also that Daniel was guilty of contributory negligence, and that William was not.

The finding as to negligence, so far as it is a question of fact, cannot be reviewed by this court; so far as it is a question of law it can be. It becomes important, therefore, to distinguish between law and fact. So far as the defendant is concerned, negligence may be defined to be a failure to perform some act required by law, or doing the act in an improper manner. The law determines the duty; the evidence shows whether the duty was performed. What duty rested upon the defendant was a question of law; was that duty properly performed was a question of fact. If the court required of the defendant some act which the law did not require, it erred in a matter of law, and the question may be reviewed by this court. If the court simply found that the defendant failed to do some required

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act, that is a finding of fact, and cannot be reviewed. The main question here is a question of duty and not a question of performance, and is therefore a question of law.

It would have simplified the case somewhat if the court had told us the specific duty or duties which the defendant failed to perform. As that was not done, we are required to consider the several duties suggested and claimed by counsel. What duty, therefore, did the law impose upon the defendant upon these facts?

In the first place, it required the engineer, after the position of the boys was discovered, to do all that could be done to prevent the accident. On this point the finding is explicit: "As soon as he could, the engineer gave two or three sharp whistle sounds, and with the other hand turned on the air-brakes. * * * Everything possible was done to stop the train, and it was stopped as soon as it could be."

In the second place, it is claimed that the train should have been run at a much lower rate of speed. This claim stated in another form is, that the defendant should have run its passenger train at this point very slowly, so that the public might safely use the railroad tracks and right of way, "passing and repassing on foot at pleasure and in all directions." We think the law imposed upon it no such duty.

In the third place, it is said that the track was so constructed, and the arrangement of the trains was such, that the attention of the engineer was required on the other side, so that there was no lookout to avert accident on the side of the track where the accident happened, and that this was negligence. The strength of this argument lies in the assumption that men, women and children had a right at all times to be on the track at that place, and that it was the duty of the defendant's servants and employes to be upon the watch and run its trains so as not to interfere with the exercise of that right, or at least so as to prevent accidents. We recognize no such right in the public, and fail to discover that the defendant owed any such duty.

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At the East Main Street crossing people had a right to pass and repass, and the engineer might well anticipate the possibility of their being about to do so as the train approached, and to be on the watch so as to be prepared instantly to do everything possible to prevent a collision. It was necessary and lawful for people to cross the railroad at that point, using, of course, due care. On the other hand it was unnecessary and unlawful for any one to be on the track at the place where these boys were injured. The first and principal duty of the engineer was to look out for people at the regular crossing. Doubtless some attention is due to possible wrong-doers, but not at the expense of others. An engineer must be diligent to see that the track is clear. Due diligence depends upon the circumstances of each case. These boys came suddenly and unexpectedly in the way of the train. It does not appear that the engineer could have discovered that they would do so any sooner than he did. There seems to have been no duty neglected by the engineer; and the defendant was under no obligation to locate its tracks, and adjust the running of its trains, so as to make it safe for persons unlawfully to trespass on its right of way.

In the fourth place, it is insisted that the defendant should have fenced its road. It is difficult to see how a fence could have been constructed at such a place so as to keep boys off the track. No ordinary fence is much of an obstruction to an active boy, and the track must necessarily be open at the street crossings. But aside from this, fences along the line of railways are required not to protect rational, intelligent beings, but animals incapable of protecting themselves. Reasonable beings are not supposed to need such protection. We are aware of no instance in which a fence is required by statute for such a purpose. We will not undertake to say that there may not be cases in which it will be wise for the legislature, or the railroad commissioners, under the general police powers entrusted to them, to require fences to keep heedless and unthinking persons off from railroad tracks; but in the absence of such

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regulations we are not prepared to say that in this case it was the duty of the defendant to have constructed a fence.

We are further told that these circumstances combined "constitute a case of negligence gross and criminal." But the learned counsel has not told us just what duty this combination imposes upon the defendant; and we are at a loss to know what duty is intended other than those we have specifically considered. We have endeavored to show that each circumstance is in itself insufficient to raise the particular duty named; and we are of the opinion that the circumstances do not supplement each other so as to raise any one of the alleged duties. The rate of speed, the arrangement of the tracks, the meeting of trains, and the absence of a fence, are not circumstances which are entitled to much more weight when combined than when taken singly; and so far as they do strengthen each other the same fatal vice attaches, namely, that the supposed duty has for its sole object the protection of wrong-doers, or, at least, of persons who have no excuse for being in the way of passing trains.

We do not think that the tender age (seven years) of one of these plaintiffs can have the effect to raise a duty where none otherwise existed. The supposed duties have regard to the public at large, and can not well exist as to one portion of the public and not to another under the same circumstances. In this respect children, women and men are upon the same footing. In cases where certain duties exist infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public, must, as a rule, have reference to all classes alike.

Our conclusion is that the facts stated disclose no duty which the defendant owed to either of these plaintiffs, and which was neglected.

We have thus far considered the case irrespective of the pleadings. The demurrer admits a cause of action. In the absence of proof the plaintiff can recover nominal damages only. But when the proof is in and the facts are

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found, the burden of proof ceases to be important, and the admission of the demurrer has no effect except to carry nominal damages and costs, if the facts, independent of the pleadings, show that the defendant is not liable. If the plaintiff recovers substantial damages it is because he is entitled to them on the facts.

The finding as to the defendant's negligence is as follows:—"Taking into account all the circumstances—the speed of the train, the fact of meeting another train at the point in question and upon this curve (which required the presence of the engineer temporarily on the south side of the engine), and at or near the crossing, the populous character of this part of the city, the known public use and unguarded and unfenced condition of the tracks, and the other facts in the case, I cannot find from the evidence that the defendant proved as a matter of fact that there was no negligence on the part of the defendant." It will be observed that the court was careful not to find that the plaintiff proved that the defendant was negligent. Evidently in this state of things the court regarded the admission by the demurrer as entitling the plaintiff to full damages. In other words, the admission was thrown into the scale as evidence, which, we think, was an erroneous use of it. But this is not of any practical importance in this case, as, for the reasons stated, we think that the facts show that the defendant omitted no duty.

The view we take as to the alleged negligence of the defendant would seem to dispose of the case of Daniel; but as the plaintiff in that case appealed, and as the question raised and discussed relates to contributory negligence, it is proper that we should say a few words on that question.

The court finds as follows:—"In the case of Daniel, considering his age and capacity, with the other facts in the case, I am of the opinion, and therefore find upon and from said facts, that he was contributorily negligent." We must regard that as conclusively determining that Daniel was in fact negligent. There is no question here as to duty. The legal question is clear; it was the duty of the plaintiff's

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intestate—a duty which in some sense he owed to the defendant—to use ordinary diligence or reasonable care to avoid accident. Whether he performed that duty is a question of fact, and was properly disposed of as such. There is no ground for saying that the court legally erred in so holding. Indeed, assuming, as we must, that all the material and substantial facts are correctly presented to us, we do not hesitate to say that the question was properly disposed of.

In *Beers v. Housatonic Railroad Co.*, 19 Conn., 566, this court, quoting from the English cases, laid down the rule as to the care required of plaintiffs in such cases, as follows:—"It must be ordinary care, which means 'that degree of care which may reasonably be expected from a person in the plaintiff's situation,' and is synonymous with reasonable care." Apply that rule to the case at bar. Do boys ten years of age ordinarily run against a locomotive, in motion, and running eighteen miles an hour? Is that what may reasonably be expected from such boys in the situation of the plaintiff? Was that reasonable care? On the contrary, is not the instinct of self-preservation as strong at that age as it ever is? Do they not sense danger of this kind as quickly and act as promptly to avoid harm as people generally?

It was broad daylight; the approaching train gave the alarm; no reason appears why the boy could not see and hear; and yet, by some strange fatality, he does not heed the warning, but rushes on until struck by the locomotive and fatally injured. Such conduct, instead of being ordinary, was extraordinary; instead of being usual, was very unusual; instead of being what might be expected, was unexpected and surprising.

We are not at liberty to follow counsel into the region of speculation for the purpose of finding a motive which will make his conduct free from blame. We are compelled to take the facts as they are presented to us in the record. It is a sad case, and appeals powerfully to one's sympathy, but we must not allow it to be an occasion of injustice. The

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defendant is entitled to have the law fairly and impartially administered.

The case of William is different. The court says:—"I cannot find that the defendant proved that in attempting to cross said tracks, when and in the manner he did make the attempt, the child did anything that ordinary children of like age, capacity and prudence, under the like circumstances, would not ordinarily do." Taken literally, the court required of the defendant something which the law did not require; but doubtless the usual course was taken; the facts were shown and then left for the court to say whether his conduct was reasonable care. And yet it is quite possible that if the court had adopted this simple rule—Was the plaintiff's conduct such as might reasonably be expected from one in his circumstances? the result would have been different.

Again, there is some reason for thinking that the court in this branch of the case also used the admission in the pleadings as substantive evidence against the defendant—as evidence which must be overcome, or the plaintiff would be entitled to full damages. We cannot account for the peculiar and unusual language of the finding upon any other theory. If the supposition is correct, we think the court gave an effect to the pleadings not warranted by law. We repeat, the only legitimate effect of such an admission in a case like this is to give the plaintiff nominal damages. Actual damages must depend upon the proof. The burden is on the plaintiff to show the extent of the damage. When he has done that he may rest. Then it is competent for the defendant to show that the actual damage is less. He may also reduce the damages by showing no negligence in himself or contributory negligence in the plaintiff. In respect to negligence the defendant assumes the burden of proof; that is cast upon him by the admission. But he may prove that he was not negligent by a mere preponderance of proof, and the preponderance required is not increased by the admission in the pleadings. The question stands like any other question in any other case, upon the proof alone.

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The court, however, in the case of Daniel, upon precisely the same facts, except that Daniel was three years older, found contributory negligence. The difference in the age makes the difference in the two cases. It is left in doubt whether the court regarded that difference as presenting a legal question or a question of fact. If, as the defendant contends, the judge decided it as a legal question, we think he made a mistake. But perhaps the better construction is that the court treated the tender age simply as evidence. If so, and the court weighed the fact with the other evidence and found due care, we cannot disturb the judgment on that ground.

The conclusion of the court is, that the court below erred in holding that any legal duty rested upon the defendant which was omitted, and did not err in holding that Daniel was guilty of contributory negligence. Consequently the judgment in the case of Daniel is affirmed, and in the case of William is reversed.

In this opinion the other judges concurred; except BEARDSLEY, J., who dissented in the case of William Nolan, on the ground that upon the finding the question of negligence was simply one of fact, which was properly disposed of by the court below.

[Note.—Judge PARDEE being disqualified by interest, Judge BEARDSLEY of the Superior Court sat in his place.]

THE SAUGATUCK CONGREGATIONAL SOCIETY vs. THE
EAST SAUGATUCK SCHOOL DISTRICT.

The declarations of a party in favor of his own title, are not admissible except where they are a part of the *res gestæ*.
And the mere absence of such declarations can not be shown by the adverse party against him.

[Argued October 30th—decided December 23d, 1885.]

Sangatuck Cong. Society v. East Sangatuck Sch. District.

ACTION to recover possession of real estate; brought to the Court of Common Pleas, and tried to the court before *Hall, J.* Facts found and judgment rendered for the defendant, and appeal by the plaintiff. The case is sufficiently stated in the opinion.

C. Thompson and *J. H. Perry*, for the appellant.

D. C. Birdsall and *R. E. DeForest*, with whom was *W. K. Seeley*, for the appellee.

CARPENTER, J. From a careful analysis of the facts of this case it appears that the record title to the land on which the school house stands is in the plaintiff. The building itself was constructed and paid for principally by the proprietors of the academy in 1804—the school district contributing to the funds of the academy the sum of \$127, being the avails of the sale of the old school house. The equitable title to the building therefore seems to have been originally in the proprietors of the academy, and is now in their heirs unless one of the parties to this suit has acquired title thereto by adverse possession. It is proper to remark, however, that the controversy relates solely to the upper room in the building, it being practically conceded that the district has been in possession of the lower room under a claim of right since 1807. On the trial both parties claimed title to the upper room by adverse possession, the plaintiff claiming partly under Miss Leavenworth, who occupied the room for a private school from 1832 to 1876.

The following quotations from the record will serve to show what the questions are which we are called upon to decide:—

“During the trial of said cause the plaintiff, having offered evidence of the adverse occupation by Miss Leavenworth and others, the defendant, for the purpose of characterizing such occupation, and to show that it was not adverse to the defendant, called as a witness Thomas D. Elwood, who testified that he had taught said district

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school since 1864, excepting two years, and the defendant thereupon asked said witness the following question:—‘During that period did you ever hear that the Congregational Society pretended to have any claim or right of ownership of the building and grounds occupied by the school until 1883?’ The plaintiff objected to, but the court admitted the question, and the witness answered—‘I never did, in any shape or manner.’

“The following question put to the same witness was objected to by the plaintiff, but admitted by the court:—‘What did Mr. Hart (the pastor before referred to) say to you, if anything, respecting the necessity of the district making repairs to the building?’ *Ans.* ‘Mr. Hart said to me, I think the district should go to work and repair that roof; if not, you will have to have an umbrella down there before long.’

“Of the defendant’s witness, Charles H. Taylor, who testified that he was fifty-four years of age, and had resided all his life in Westport, that he had attended Miss Leavenworth’s school, and had been two years treasurer and six years committee of the district prior to 1883, the defendant asked the following question, which was received against the plaintiff’s objection:—‘During all that time did you ever hear that the plaintiff made any claim of right of ownership to the school house and yard until last year?’ *Ans.* ‘I did not.’

“Against the objection of the plaintiff the witness further answered:—‘I never heard of Miss Leavenworth making a claim of ownership until the record of this deed.’” (A deed from Miss Leavenworth to the society in December, 1882.)

Similar questions were put to, and similar answers obtained from, other witnesses.

It is difficult to vindicate the reception of this evidence. Possession does not receive its adverse character from the declarations of the party in possession, except when such declarations may be regarded as *res gestæ*. The mere declarations of a party can not be admitted in his own favor.

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It follows that the mere absence of such declarations can not be shown by the adverse party against him. A party is not bound to make public proclamation that he holds adversely; therefore whatever he says or omits to say is a matter of no importance, unless he speaks against his interest, or fails to speak when required to do so. The adverse character of the possession is ordinarily, if not always, shown by the facts of the case, and not from loose and casual declarations. Therefore the absence of such declarations has no tendency to prove that the possession is not adverse. A corporation usually speaks by its agents authorized to speak for it, and through its votes and acts. Here the absence of rumor in the community is allowed to have weight in the judicial scales. It is not merely hearsay that is invoked, but it is the absence of hearsay. Equally objectionable is the declaration of Mr. Hart. Being no party to the suit, whatever he said was mere hearsay.

There is error in the judgment, and it is reversed and a new trial ordered.

In this opinion the other judges concurred.

DANIEL S. SHEEHAN *vs.* WILLIAM STURGES.

The reasonableness of the punishment administered by a school teacher to a pupil is purely a question of fact.

A school teacher has a right to require obedience to reasonable rules and a proper submission to his authority, and to inflict punishment for disobedience.

In the absence of rules established by the school board or other proper authority, the teacher has a right to make all necessary and proper rules for the regulation of the school.

In inflicting corporal punishment the teacher must be governed, as to the mode and severity of it, by the nature of the offense, and by the age, size, and physical condition of the pupil.

Where a boy has been habitually refractory and disobedient the teacher in punishing him for a particular offense may take into consideration his habitual disobedience.

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And it is not necessary that he should inform the pupil at the time that he is punishing him for his past as well as present misconduct.

[Argued November 3d—decided November 24th, 1885.]

ACTION for an assault and battery; brought to the Superior Court, and tried to the court before *Beardsley, J.* Facts found and judgment rendered for the defendant, and appeal by the plaintiff. The case is sufficiently stated in the opinion.

J. S. Seymour, for the appellant.

J. H. Perry, with whom was *W. H. Perry*, for the appellee.

GRANGER, J. This is a complaint for an assault and battery. The defense is that the plaintiff was at the time a pupil in a school kept by the defendant, that he wilfully violated the reasonable rules of the school and disobeyed the reasonable commands of the defendant as his teacher, and that for this misconduct the defendant as such teacher whipped him in a reasonable manner. The sole controversy upon the trial was as to the reasonableness of the punishment inflicted. The court found that "such whipping was not unreasonable or excessive and was fully justified by the plaintiff's misconduct at that time."

The extent and reasonableness of the punishment administered by a teacher to his pupil, is purely a question of fact. This is too well settled to make the citation of authorities necessary. The finding of the court therefore settles the question as to this, unless the court acted upon improper evidence.

The plaintiff testified as a witness in his own behalf, and on his cross-examination the defendant, against the objection of the plaintiff's counsel, was allowed to ask him whether, on two former occasions, both of them more than a week before the whipping in question, he had not assaulted the teacher while he was chastising him. And the defend-

ant afterwards, in his testimony in his own behalf, was allowed, against the objection of the plaintiff, to state that the plaintiff's conduct in school was habitually bad, and that on two former occasions, one of them about two weeks and the other seven or eight days before the whipping in question, the plaintiff had assaulted him while he was chastising him.

The defendant was also allowed, on the plaintiff's cross-examination, against objection, to inquire of him whether he had not, seven or eight days before the whipping in question, put stones in his pocket and declared that he was going to attack the teacher with them. The plaintiff, in answer to the inquiry, denied that he had done so, and the defendant, against the plaintiff's objection, was allowed to show by a witness that the plaintiff had so done.

The defendant did not inform the plaintiff at the time of the whipping that he was punishing him for his past and habitual misconduct.

We think the court committed no error in admitting the inquiries and evidence. The right of the schoolmaster to require obedience to reasonable rules and a proper submission to his authority, and to inflict corporal punishment for disobedience, is well settled. It is said in the *Encyclopedia of Education*, edited by Kiddle and Schem, page 189, that "the school codes of the United States are generally silent in regard to the right of teachers to inflict corporal punishment; and there are numerous judicial decisions in favor of this right. By English and American law a parent may correct his child in a reasonable manner, and the teacher is *in loco parentis*." Citing 2 Kent Com., 203; 1 Black. Com., 453; *Commonwealth v. Randall*, 4 Gray, 36; *State v. Pen-dergast*, 2 Dev. & Batt., 365; *Stevens v. Fassett*, 27 Maine, 280; *Lander v. Seaver*, 32 Verm., 123.

As incident to this relationship it is the right of the teacher, in the absence of rules established by the school board or other proper authority, to make all necessary and proper rules for the good conduct and order of the school; and it is his duty to see that order is maintained and the rules observed. And if any scholar violates the rules and

disobeys the orders of the teacher, it is the duty of the latter to enforce compliance, and to that end it may be necessary to inflict personal chastisement, as without it he might lose all control of the school.

In inflicting such punishment the teacher must exercise sound discretion and judgment, and must adapt it not only to the offense but to the offender. Horace Mann, a high authority in the matter of schools, says of corporal punishment: "It should be reserved for baser faults. It is a coarse remedy, and should be employed upon the coarse sins of our animal nature, and when employed at all should be administered in strong doses." Of course the teacher, in inflicting such punishment, must not exceed the bounds of moderation. No precise rule can be laid down as to what shall be considered excessive or unreasonable punishment. Reeve's Dom. Rel., 288. Each case must depend upon its own circumstances. In *Commonwealth v. Randall*, 4 Gray, 36, it is held that, "in inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, and the age, size, and apparent powers of endurance of the pupil." And we think it equally clear that he should also take into consideration the mental and moral qualities of the pupil, and, as indicative of these, his general behavior in school and his attitude towards his teacher become proper subjects of consideration.

We think therefore that the court acted properly in admitting evidence of the prior and habitual misconduct of the plaintiff, and that it was perfectly proper for the defendant, in chastising him, to consider not merely the immediate offense which had called for the punishment, but the past offenses that aggravated the present one, and showed the plaintiff to have been habitually refractory and disobedient. Nor was it necessary that the teacher should, at the time of inflicting the punishment, remind the pupil of his past and accumulating offenses. The pupil knew them well enough, without having them brought freshly to his notice.

There is no error.

In this opinion the other judges concurred.

WALTER C. QUINTARD, TREASURER, *vs.* CHRISTIAN
KNOEDLER AND ANOTHER.

53	485
55	30
53	485
70	73
53	485
71	458

A person is "convicted" of a crime, according to the ordinary use of that term, when he has been found guilty by a jury or has pleaded guilty, although there has been no sentence or judgment by the court.

And the word is used in this sense in the act of 1882 (Session Laws 1882, ch. 107, part 4, sec. 2), which provides for a suit on the bond given by a person licensed to sell liquor, whenever such person has been convicted of a violation of the statute.

[Argued November 3d—decided November 24th, 1885.]

ACTION on a bond given upon a license granted to one of the defendants to sell liquor, to secure his compliance with the law; brought by the plaintiff, as treasurer of the county, to the Court of Common Pleas, and tried to the court before *Hall, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendants. The case is fully stated in the opinion.

D. B. Lockwood, for the appellants.

A verdict of guilty without a judgment is not a conviction. Wharton's *Crim. Ev.*, §§ 489, 609; 1 *Greenl. Ev.*, § 375; 1 *Hale P. C.*, 686; Buller's *N. P.*, 392; *Rex v. Careinion*, 8 *East*, 77; *Sutton v. Bishop*, 4 *Burr.*, 2286; *Lee v. Gansel*, *Cowp.*, 3; *Regina v. Ackroyd*, 1 *Car. & K.*, 158; *Regina v. Hinks*, 2 *id.*, 464; *Fitch v. Smallbrook*, *Raym.*, 32; *Cushman v. Loker*, 2 *Mass.*, 108; *Com. v. Gorham*, 99 *Mass.*, 420; *Smith v. Com.*, 14 *Serg. & R.*, 69; *U. States v. Dickinson*, 2 *McLean*, 325; *Skinner v. Perot*, 1 *Ashm.*, 57; *People v. Herrick*, 13 *Johns.*, 82; *People v. Whipple*, 9 *Cowen*, 707; *Pitts v. Pitts*, 52 *N. York*, 593; *Schiffer v. Pruden*, 64 *id.*, 47; *Blanfus v. The People*, 69 *id.*, 107; *Dawley v. The State*, 4 *Ind.*, 128; *Faunce v. The People*, 51 *Ill.*, 311. The attorney for the state has a right to nolle a case after verdict and before sentence. *Com. v. Briggs*, 7 *Pick.*, 177; *Com. v. Tuck*, 20 *id.*, 366; *Com. v.*

Quintard v. Knoedler.

Jenks, 1 Gray, 490; *State v. Burke*, 38 Maine, 574; *State v. Roe*, 12 Verm., 93.

F. L. Holt, for the appellee.

LOOMIS, J. The complaint seeks to recover the penalty named in a bond, dated May 28th, 1883, given by Knoedler, one of the defendants, as a licensed liquor dealer, to secure his compliance with the provisions of the act under which his license was granted.

The breach of the bond consisted in the fact, which was established by proper evidence, that, before the Superior Court for Fairfield County, at its February term, 1884, upon proper information and proceedings, Knoedler was found by the jury guilty of keeping open on Sunday a place where it was reputed that intoxicating liquors were sold contrary to the statute. After the verdict the attorney for the state moved that the court pronounce sentence against the defendant, but it was found that he had fled, and thereupon the bond was called and forfeited, but no sentence was pronounced. No appeal or other proceedings have ever been taken to set aside the verdict or for a new trial. In this condition of things the plaintiff, as county treasurer, instituted this suit, pursuant to the provisions of section 2, part 4, of the act of 1882, (Session Laws 1882, p. 181), which is as follows:—"And whenever the person so licensed shall be convicted of a violation of any of the provisions of part six of this act, and no appeal is pending, said bond shall thereupon become forfeited, and the treasurer of said county shall, in his own name, institute suit upon said bond for the benefit of said county, and upon due proof of said conviction the court before which said suit is brought shall render judgment in favor of said treasurer for the entire amount of said bond, with costs."

The only defense was that no sentence was rendered pursuant to the verdict. The question was raised in two ways—by objecting to the record of the Superior Court offered in evidence by the state, and by claiming, after it

was received, that no breach of the bond was shown; but the question for review is one and the same, namely, whether within the meaning of the statute there could be a conviction without a sentence or judgment by the court. The only difficulty in answering this question arises from the fact that the word "conviction" has been sometimes used by courts as including the final judgment of the court, but that such is not the ordinary and usual meaning may be demonstrated by reference to numerous authorities, which, however, we do not deem it necessary particularly to cite. The principles established are well summarized by Bishop in his Treatise on Statutory Crimes, § 848, as follows:—"The word 'conviction' ordinarily signifies the finding of the jury by verdict that the prisoner is guilty. When it is said there has been a conviction, or one is convicted, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been rendered. So a plea of guilty by the defendant constitutes a conviction of him. Lord Coke distinguishes thus:—'The difference between a man attainted and convicted is, that a man is said to be convict before he hath judgment; as if a man be convict by confession, verdict or recreancy. And when he hath his judgment upon the verdict, confession or recreancy, or upon outlawry or abjuration, then he is said to be attaint.' Yet the word 'conviction,' when it stands in such a connection with other words as to indicate a *secondary or unusual meaning*, sometimes denotes the final judgment of the court." See also the definition of the word as found in the law dictionaries of Jacobs, Wharton and Burrill.

In *Commonwealth v. Lockwood*, 109 Mass., 323, the defendant was tried upon an indictment for cheating by false pretences, and the jury returned a verdict of guilty, but exceptions were taken to the rulings of the presiding judge and no sentence was pronounced. While the exceptions were pending, the governor, with the advice of the council, granted the defendant a pardon. But the constitution of that state commits to the governor and council the pardoning power under this limitation: "but no charter of pardon

Quintard v. Knoedler.

granted by the governor, with the advice of the council, *before conviction*, shall avail the party pleading the same." The accused did not pursue his exceptions, but filed his charter of pardon in bar. To this the district attorney replied that the pardon was null and void under the constitutional provision referred to, in that it had been granted before conviction. The court held, in a very elaborate opinion by GRAY, J., that the term "conviction," as used in the constitution, should be construed in its usual and ordinary sense, and that it did not include the sentence of judgment. It will be observed that the court held the verdict of guilty by the jury a conviction, notwithstanding the pendency of exceptions, which, if pursued, might have set the verdict aside. In our statute the pendency of an appeal is provided for. It prevents a suit on the bond. If this provision has any effect, it would seem to make the reason for the construction we have given stronger rather than weaker, inasmuch as it involves an implication that the omission of such a provision might have made the defendant liable notwithstanding an appeal. There was here not only no appeal, but no possibility of one.

If now we pass from the most approved legal definitions of the term under consideration and seek what light we may from the actual use of the same word in other statutes, we are confident that nothing can be found to militate against the definition assumed. In a large majority of instances where it is used, it manifestly refers to a finding of the party guilty by verdict or plea of guilty, and not to a sentence in addition.

Our conclusion therefore is that the verdict was a conviction, and there being no appeal or ulterior proceedings of any kind pending to set aside the verdict, there was a breach of the bond in suit.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

Beardsley v. Selectmen of Bridgeport.

ELLIOT M. BEARDSLEY, EXECUTOR, *vs.* THE SELECTMEN
OF BRIDGEPORT AND OTHERS.

53	489
57	286
53	489
68	384
53	489
68	531

A testator gave his wife the use for life or widowhood of his entire estate. By a codicil he gave \$1,000 each to two charitable societies. Held that the latter bequests were not subject to the life estate of the wife, but were to be paid at the usual time.

The testator directed that after his wife's marriage or death his whole estate should "be used at discretion by the acting selectmen of *B* for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans, residing in *B*, until all is expended." Held not to be void for uncertainty.

The question in such a case is, not whether there are not many persons concerning whom there must be doubts as to their meeting the requirements of the bequest, but whether there are not many concerning whom there can be no doubt as to their meeting them all.

The persons holding the office of selectmen of *B* were joint trustees, in perpetual succession, clothed with power and placed under obligation to select beneficiaries from the classes specified and apply either the income or the principal of the fund, at their discretion, for their relief.

[Argued November 4th—decided November 24th, 1885.]

SUIT by an executor, for advice as to the construction and validity of certain bequests in a will and codicil; brought to the Superior Court.

The will in question was that of Aaron Summers, of Bridgeport, Conn., who died in April, 1884. It was dated March 16th, 1881, and was as follows:

"I, Aaron Summers, of Bridgeport, do will and bequeath the use of my whole estate, both personal and real, after my just debts and funeral charges are paid, to my wife, Anna Maria, while she remains my widow. After her second marriage, if it should ever occur, or her decease, I will the whole of my estate, both personal and real, to be disposed of within a reasonable time after my decease and hers (meaning my wife) by my executor, and deposited in some safe banking institution or institutions in the town of Bridgeport, or within the state of Connecticut, to be used discretionary by the acting selectmen of said Bridgeport, for the special benefit of the worthy, deserving, poor, white,

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American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, until all is expended. I also will that not one of my connections shall have a dollar; also not one of my wife's connections shall have a dollar, but strictly among those entirely disconnected, as mentioned in this will. No partiality to friends."

On the 18th of October, 1882, the testator executed the following codicil to his will:

"I, Aaron Summers, being still of sound and disposing mind and memory, and desiring in some respects to change my last will, dated March 16th, 1881, do hereby make, publish and declare the following as a codicil to said last will, in manner and form following, to wit:

"*First*, I give and bequeath unto the Bridgeport Protestant Orphan Asylum of Bridgeport, Conn., the sum of one thousand dollars, to be used for the general purposes of said asylum.

"*Second*, I give and bequeath unto The Bridgeport Hospital the sum of one thousand dollars, to be used for the general purposes of said hospital.

"I hereby revoke and annul any and all parts of my said will which are inconsistent with this codicil, but the remainder of said will I hereby distinctly re-affirm and publish."

The case was reserved for the advice of this court.

R. C. Amber, for the executor.

J. A. Joyce, for the selectmen of Bridgeport.

J. J. Rose, for the Bridgeport Hospital.

H. S. Sanford, for the Bridgeport Orphan Asylum.

J. C. Chamberlain, for the widow.

L. Warner, for the heirs at law.

PARDEE, J.—By his will as originally made Aaron Sum-

Beardsley v. Selectmen of Bridgeport.

mers gave to his wife the use of his entire estate during life or widowhood; by the codicil he gave \$1,000 to the Bridgeport Protestant Orphan Asylum and \$1,000 to the Bridgeport Hospital. The claim of the widow is, that she is to have the use for life of the entire estate and that neither of these legacies is payable until after her death. But the office of this codicil is to change what had been written before; it is the latest and controlling expression of the testator's wish. The bequests thereby made are absolute in terms; as perfectly so as is the devise of the life use to the wife in the will. The expressions are all free from ambiguity; all express a legal intent in legal language; and in them the rules of law require us to find the precise extent of the change intended by the testator. These legacies are therefore payable at the usual time.

Subject to the use for life by his wife and to diminution by certain legacies, the testator disposes of his estate as follows: "To be used discretionary by the acting selectmen of said Bridgeport for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut, until all is expended."

It is the claim of the heirs at law that this bequest is void for uncertainty as to the persons composing the class to be benefited, and they have pressed upon our attention the doubts and difficulties which will beset the trustees whenever they shall attempt to select the beneficiaries. But notwithstanding the accumulation of adjectives the bequest is within our statute of charitable uses as interpreted by this court; for it is to be borne in mind that the question before us is not—are there not many persons concerning whom there must be doubts whether they can meet some of the requirements of the testator? but it is, are there not many concerning whom no doubt can exist that they are able to meet them all? Each one of the adjectives is of common use and has as definite and precise a meaning as have most words in the language. Of course there are all grades of character and of pecuniary condition, and all shades of

color; of course men may profess the Protestant faith and worship after its forms; may advocate the principles of the Democratic party and vote for its candidates, and yet at heart accept neither. But, notwithstanding all this, men are constantly deciding and acting, in matters which concern both property and person, upon the belief that they will not be misunderstood when they use adjectives like these under consideration. The business of the world will not, cannot, wait until every word shall become mathematically precise.

The office of selectmen is continuous by law. The persons from time to time constituting the board of selectmen of the town of Bridgeport are joint trustees in perpetual succession, clothed with power and placed under obligation to select beneficiaries from the classes specified by the testator and apply either the interest or the principal of the fund to the relief of their necessities at discretion.

The beneficiaries must be "poor." This word as used by the testator includes those who have exhausted all means of support and are in a condition to require public aid for the supply of their necessities; certainly it includes those who as paupers are receiving such aid, and therefore, beyond all question within the statute.

They must be "worthy and deserving." In *White v. Fisk*, 22 Conn., 31, the descriptive adjective was "pious;" in *Treat's Appeal from Probate*, 30 Conn., 113, this court said of the will under consideration in *White v. Fisk*, that the testator "had provided in his will no way of selecting the beneficiaries from a class, and the court held that they could not, even as a court of equity, do it for him. Had that power been given to his executors or trustees the clause in the will would have been sustained." To determine that one is "worthy and deserving," is no more difficult than to determine that he is "pious."

They must be "white." In *Treat's Appeal from Probate* just referred to, they were "Indians and Africans," and the bequest was sustained. It is as difficult to declare of a person that he has color as that he has none. For many

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years by the constitution of this state only white men were permitted to vote; if the word has in the general mind a meaning so sharply defined that it can be put to a use so practical and so important, we think it may well support a charitable bequest.

They must be "American." In the general mind this adjective now describes the descendants of Europeans born in America, and is applied especially to the inhabitants of the United States; persons quite as easily distinguished as Indians and Africans.

They must be "Protestant." This adjective was defined and declared capable of sustaining a charitable bequest by this court in *Tappan's Appeal from Probate*, 52 Conn., 412.

They must be "Democratic." It is a matter of common knowledge that there is a political party known as the Democratic party, to which a large portion of the voters in every one of the United States adhere; which they support by speech and act—by advocating its principles and voting for its candidates for office; and that the determination of the question as to what persons and principles shall be in the ascendant in government for the time being depends upon the belief of the voter that the speech and the act of the candidate are true indexes of his opinion. The trustees are to inquire and decide concerning a given man whether they believe that he adhered to and supported the principles of the Democratic party; and they may well rest upon reasons which are sufficient to control the general mind of voters in a matter of the highest importance.

They may be "orphans." This word describes a child who has lost one or both of its parents. He may be extremely young and so of course without character, religious belief, or political principles, and as by law neither women nor children vote, so in the common speech neither are said to have democratic or other political principles. Therefore it must be determined to have been the intent of the testator, as to an orphan not of sufficient age to have acquired a character, that he should have been born of white, American and Protestant parents, of a Democratic father, and be des-

Messer v. Wildman.

titute; and as to a widow, that she should be worthy, deserving, poor, white, American, Protestant, and have had a Democratic husband.

The Superior Court is advised that the bequest for "the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut," is valid; and that the legacies by the codicil to the Bridgeport Protestant Orphan Asylum and to the Bridgeport Hospital are payable at the expiration of one year from the death of the testator.

In this opinion the other judges concurred.



ELIAS MESSER vs. ALEXANDER WILDMAN AND OTHERS.

An alteration of a public street in a borough was laid out by the authorities of the borough, and an appeal was taken by one of the land owners for a re-assessment of his damages. While this appeal was pending the borough voted to accept the lay-out of the alteration. Held that its action was not invalidated by the pendency of the appeal, and that by its acceptance the alteration became legally established.

[Argued November 4th—decided November 13th, 1885.]

ACTION for wrongfully entering upon the plaintiff's land and removing fences thereon; brought, by appeal from the judgment of a justice of the peace, to the Court of Common Pleas. The defense was that the land upon which the defendants entered was a legal highway of the borough of Danbury, and that the fences removed were obstructions which the plaintiff had placed across a part of the highway and which the borough had voted to have removed; and that the acts of the defendants were done by order of the warden and burgesses of the borough. The case was tried to the jury before *Hall, J.* Verdict for the defendants, and appeal by the plaintiff. The case is sufficiently stated in the opinion.

Messer v. Wildman.

W. F. Taylor and H. W. Taylor, for the appellant.

L. D. Brewster, for the appellees.

PARK, C. J. It appears in this case that the *locus in quo* lies within the limits of a lay-out by the warden and burgesses of the borough of Danbury of an alteration of White and Canal streets within the borough; which alteration was subsequently formally accepted by the borough, at a special meeting duly warned and held.

All this was done previously to the commission of the acts complained of by the plaintiff; and the only question is—did the lay-out and its acceptance constitute the alteration a part of the public streets. If it did, then the plaintiff has no cause to complain, and the court below committed no error in so holding; if it did not, then there is error, and the judgment must be reversed.

It appears that the warden and burgesses appraised no damages for the lands taken for the alteration, on the ground that the benefits resulting to the owners respectively would be greater than their damages; and that one of the owners had appealed to a judge of the Superior Court for a reassessment of his damages; which appeal was pending when the acts were committed of which the plaintiff complains.

The plaintiff insists that the appeal stayed all proceedings till it should be determined, and that therefore the action of the borough in accepting the lay-out of the alteration was void.

There is nothing substantial in this claim. The appeal called in question only the damages of the appellant. Whether those damages were one sum or another, was a matter that the plaintiff and all others had no concern with.

It is true that the inhabitants of the borough might have delayed their action in accepting the lay-out till the appeal had been determined, had they felt so disposed. But they saw fit to accept it during its pendency; and they were bound by this action, as much as they would have been had they waited for the determination of the appeal; the only

Benedict v. Pearce.

difference being that, up to the acceptance, the borough could have abandoned the attempted improvement, which afterwards was not in their power, and therefore they would have had a longer time for consideration of the question of abandonment in one case than in the other.

But it is said that the plaintiff, like the others, was assessed no damages on the ground that his benefits from the alteration would be greater than his damages, and that such benefit could result only from the whole alteration being made.

This is true. But the appeal does not, and could not, prevent the whole alteration from being made. It only calls in question the appellant's damages, as we have seen. The borough is now bound to make the alteration, whether the appellant's damages are one sum or another.

The remaining points made by the plaintiff are clearly untenable, and require no discussion.

There is no error in the judgment.

In this opinion the other judges concurred.

53 496
57 514

EDGAR A. BENEDICT AND OTHERS *vs.* DAVID PEARCE
AND WIFE.

A husband, without the knowledge of his wife, submitted to arbitration a question as to a boundary line of her land. Held that she could not be affected by the award.

In a suit against the husband and wife, involving the question of the true line, the award was offered in evidence against both, and provisionally admitted by the court on the statement of the plaintiff's counsel that they would connect the wife with the submission; the judge saying to the jury that, if the plaintiffs' counsel should fail to do this, he would instruct them in the charge as to the effect of the evidence. Such connection not being shown, the judge instructed the jury that the award was not conclusive on the wife, but that she could show, notwithstanding, the true line. Held that the jury under this charge must have considered the award as admitted in evidence against the wife, while it should have been wholly ruled out as to her.

[Argued November 4th—decided November 24th, 1885.]

Benedict v. Pearce.

ACTION for entering on the plaintiffs' land and erecting a fence thereon ; brought, by appeal from the judgment of a justice of the peace, to the Court of Common Pleas, and tried to the jury before *Hall, J.* Verdict for the plaintiff, and appeal by the defendants. The case is sufficiently stated in the opinion.

H. W. Taylor, with whom was *W. F. Taylor*, for the appellants.

L. D. Brewster, for the appellees.

PARK, C. J. It appears in this case that the plaintiffs and the defendant *Mrs. Pearce* were owners of adjoining tracts of land, the defendant's tract lying north of the plaintiffs', and that the true line between them was the centre line of a board fence, which had separated the tracts for many years previous to 1884.

In the year 1884 the defendants removed the divisional fence and erected another, and this act is the ground of this suit.

While the new fence was being erected a dispute arose between one of the plaintiffs and the defendant *David Pearce* regarding its line, the plaintiff contending that the fence was placed upon the land of the plaintiffs, and *Mr. Pearce* insisting that it was upon the line of the old fence. The dispute resulted in the parties submitting the matter in controversy to the arbitrament of certain persons. This was done without the consent or knowledge of *Mrs. Pearce*, and without her knowledge or consent the arbitrators heard the other parties interested and made an award favorable to the plaintiffs. Upon the trial of the cause, which is an action for damages for placing the fence upon the land of the plaintiffs, the latter offered the submission and award of the arbitrators in evidence "to prove the location of the divisional line between the tracts," and as "conclusive upon both of the defendants upon the question of the location of the line."

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The defendants objected to the reception of the evidence, but the court admitted it upon the statement of the plaintiffs' counsel that they intended to show that the submission and award were made with the knowledge and consent of Mrs. Pearce. In the admission of the evidence the court remarked "that upon failure of the plaintiffs to prove that Mrs. Pearce was a party to the submission and award, the jury would be instructed in the charge regarding the effect of the evidence." The plaintiffs failed to prove such connection, and the court charged the jury upon the subject as follows :

"The submission by Mr. Pearce and the plaintiffs of this question of the old fence, or the true divisional line, to the arbitration of Selleck and McPhelmy, and their award, is not conclusive upon the defendants, or either of them. Notwithstanding such submission and award the defendants, or either of them, may prove that the fence erected in 1884 was placed upon the true divisional line, or line of the old fence erected in 1864. The evidence respecting the submission and award is not wholly excluded from your consideration. The acts of the arbitrators upon the premises in the presence of the plaintiffs and Mr. Pearce, while the fence in question was in process of erection, and the conversation of the parties, were so connected with the controversy respecting the location of the old fence as to render them admissible; and the jury may consider the declarations of Mr. Pearce made at that time as against him, and especially in connection with his testimony on the trial."

It appears therefore that the evidence, which was provisionally received against Mrs. Pearce, to be disposed of in the charge to the jury if the plaintiffs should fail to connect her as a party with the submission and award, was not ruled out, as against her, in the charge; and here we think the court erred. Clearly Mrs. Pearce could not be affected in her rights regarding her property by the acts or declarations of her husband made in her absence, and without her knowledge or consent, as the case finds.

But it is said that the error of the court could not have

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done Mrs. Pearce any harm because it was received conditionally by the court, upon the statement of the plaintiffs' counsel that they intended to connect her as a party with the submission and award ; and subsequently, in the argument to the jury, the counsel conceded that they had failed to show such connection ; therefore, it is said, the jury must have understood that the evidence was out of the case so far as she was concerned.

But the court, in the charge to the jury, gave them clearly to understand that the evidence was in the case against both of the defendants. The court said to the jury that the submission and award were not conclusive upon the defendants, or either of them ; that the defendants, or either of them, could notwithstanding prove that the new fence was on the line of the old one. Surely the court gave the jury to understand that the evidence was in the case for their consideration against Mrs. Pearce, notwithstanding what occurred when it was received. Indeed the court remarked at the time that upon failure of the plaintiffs to prove that Mrs. Pearce was a party to the submission, the jury would be instructed in the charge regarding the effect of the evidence. The jury, therefore, waited to learn from the charge what the court would do with the evidence against her, and instead of its being ruled out it was virtually ruled in by the court. We think it is clear that the court erred in receiving the evidence against Mrs. Pearce, and that her rights were injuriously affected by its admission.

There is error in the judgment appealed from so far as Mrs. Pearce is concerned ; and as to her the judgment is reversed and a new trial ordered.

There is no error so far as the defendant David Pearce is concerned.

In this opinion the other judges concurred.

Harris v. Taylor.

CHARLES HARRIS, ADMINISTRATOR, vs. FRANK N.
TAYLOR.

The defendant occupied, under the plaintiff as administrator, certain real estate that belonged to the estate of the intestate. Held that he could not set off a debt due him from the intestate in his lifetime, against a claim of the plaintiff for the rent.

And held that it did not affect the case whether the estate was in settlement as a solvent or insolvent estate, nor whether, if in settlement as a solvent estate, it was in fact solvent or insolvent.

Where an administrator sues upon a claim that has accrued in his favor after the death of the intestate, the designation of himself in the writ as administrator is mere description, and not necessary. The claim, though due to him in his official character, is yet one that never existed in favor of the intestate, and so is not held by him in his representative character.

[Argued November 4th—decided November 13th, 1885.]

ACTION to recover for use and occupation of real estate; brought to the Court of Common Pleas. The defendant pleaded a set-off. Tried to the court before *Hall, J.* Facts found and judgment rendered for the plaintiff. Appeal by the defendant. The case is fully stated in the opinion.

H. S. Sanford, with whom was *D. C. Birdsall*, for the appellant.

C. Thompson and *A. M. Tallmadge*, for the appellee.

GRANGER, J. The plaintiff is administrator of the estate of one Goodsell, who died March 24th, 1884, and is settling the estate as a solvent estate. The defendant, from April 1st, 1884, to April 1st, 1885, occupied, under the plaintiff as administrator, certain real estate belonging to the estate, and the sum of \$300 is found to be a reasonable charge for this occupation. This has never been paid, and the plaintiff as administrator sues to recover it. The defendant admits his right to recover it unless he can legally set off against the claim, a claim of his own against the intestate in his lifetime and

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now against his estate. The whole of the claim which the defendant thus seeks to set off is \$413.64, of which \$162 was, within the time limited by the probate court, duly presented against the estate, but by mistake the whole claim was not presented. The plaintiff objected to this set-off, because, in the first place, the debts were not mutual, the claim sued on being due to the administrator in his character as such, and not in his representative character, and the claim sought to be set off being due originally from the intestate and now from the administrator only as the representative of the intestate; and secondly, because the estate is in fact insolvent although in settlement as a solvent estate. The plaintiff offered proof that the debts proved against the estate were largely in excess of the value of the estate, making the estate in fact insolvent. To this evidence the defendant objected, but the court admitted it, and found that the estate was in fact insolvent, and also held the set-off not admissible on the ground that the debts were not mutual. The defendant appeals from the judgment against him, claiming the court to have been in error in both these rulings.

We regard the case of *Nichols v. Dayton*, 34 Conn., 65, as decisive of this. There such a set-off was held inadmissible. It is true that the estate was there in settlement as an insolvent estate. But the decision is not put upon that ground at all, but wholly on that of the want of mutuality. HINMAN, C. J., giving the opinion of the court, says (p. 66:)—"The debts were not mutual. The executor under the statute has the same control of the real estate, during the settlement of the estate, that he has of the personal property, and the same title to it and possession of it, and although he holds in trust for the benefit of the estate the title is still in him; whereas the note against the deceased is not in any sense the executor's debt, or a debt against him, but is solely due from the estate, and if put in suit and judgment recovered upon it, execution would go against the assets of the estate only."

A certain appearance of mutuality is given to the claims

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because the plaintiff sues as administrator. But he need not have sued in that way—the claim is due to him personally and not as a representative of the intestate, and his designation of himself as administrator is mere description and not a matter of substance. The debt, while due to him in his official character, is yet one that accrued in his favor and had never accrued in favor of his intestate.

The objection of the want of mutuality being fatal to the right of set-off, it is of no consequence whether the estate was in fact solvent or insolvent, or was represented as either, and the ruling of the court admitting evidence that it was insolvent was of no importance.

There is no error in the judgment appealed from and it is affirmed.

In this opinion the other judges concurred.

HENRY SEYMOUR *vs.* THE OVER-RIVER SCHOOL DISTRICT.

W, a district school teacher, received for a month's salary an order of the committee on the district treasurer, and transferred it, indorsed in blank, to a third person, who in good faith paid him the money for it. This had been the usual mode of monthly payment for two years that *W* had been employed by the district, and the delivery of the order was so understood by both parties. The district, before the order was presented to the treasurer and before it had received notice of the transfer, was garnished as the debtor of *W*. Held that the delivery of the order operated as payment, and that the district was not indebted to *W* at the time of the service of the factorizing process.

A district school teacher is not a public officer within the meaning of the law exempting the salaries of such officers from attachment.

Nor is he an officer in the ordinary sense of the term. He is simply in the employment of the district.

A debt owed by a school district may be taken by foreign attachment.

W's salary as school teacher was \$1,200 a year, but there was no express contract as to the time of payment. It was found however that it was the understanding of the parties that it should be paid in ten monthly payments of \$120 each, at the close of each month of the school year of ten months, and that such had been the practice. Held that the salary was thus apportionable.

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And held that when the last school day of a month had passed, the salary for the month was earned, and could be taken by foreign attachment, although the month had not expired.

[Argued November 5th, 1885—decided February 19th, 1886.]

SCIRE FACIAS upon a process of foreign attachment; brought to the Court of Common Pleas, and tried before *Hall, J.* Facts found and judgment rendered for the plaintiff for a part of his demand. Both parties appealed. The case is sufficiently stated in the opinion.

J. H. Perry, for the plaintiff.

1. The order of November 3d, 1883, although negotiable in form, was not so in law. 1 Daniel on Negotiable Instr., § 427; 1 Dillon Mun. Corp., § 487; *Smith v. Inhab. of Cheshire*, 13 Gray, 318; *Allison v. Juniata County*, 50 Penn. St., 353. Being non-negotiable and no notice of the assignment having been given to the district, the money due Wigham at the time it was given was taken by the attachment. *Bishop v. Holcomb*, 10 Conn., 444; *Fanton v. Fairfield Co. Bank*, 23 id., 485.

2. Wigham's salary was not exempted from attachment by reason of his being a teacher of a public school, nor because his salary was due from a school district. *Bray v. Wallingford*, 20 Conn., 418; *New Haven Saw Mill Co. v. Fowler*, 28 id., 103, 110; *Flagg v. Platt*, 32 id., 216; *Rodman v. Musselman*, 12 Bush, 354.

3. It is claimed by the defendant that there was no proof that Wigham kept a school register, which by the statute is made a condition of his right to recover his salary. But it was not for the plaintiff to prove that he kept such a register. In the absence of all proof on the subject it would be presumed that he did his duty. *Rex v. Hawkins*, 10 East, 216; 2 Phill. Ev., part 1, 298; 1 Greenl. Ev., § 40; *Spooner v. Payne*, 16 Jur., 367; *Booth v. Booth*, 7 Conn., 350; *Hartwell v. Root*, 19 Johns., 345; *Bank of U. States v. Dandridge*, 12 Wheat., 64. Especially would this presumption exist here, since the district had regularly paid him for two

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years and a half, and has actually paid him a part of the very money now sued for.

4. The salary of Wigham was apportionable, and unpaid portions of it had been earned at the times of the several attachments. For two years Wigham had been paid \$120 a month at the end of each of the ten months of the school year. There are two characteristic features of every payment: its amount and the time when it is to be made. The district, at the beginning of the third year, voted to employ him "at the same salary as last year." It could not be the same salary if it differed in the time of payment any more than if it differed in amount. A salary payable at the end of ten months is a very different consideration from one payable in installments at the end of each of them. Wigham accepted the employment thus tendered, and the court finds that "it was the intention and understanding of the contracting parties that Wigham should be paid \$120 a month for the ten months of said school year of 1883, and that the same should be paid at the end of each of said months." The defendant, as the finding shows, in fact paid the salary monthly during the time covered by this suit. If the salary was payable monthly, each payment was compensation for a month's services, and was earned when those services had been rendered. The October salary was attached November 5th. The December salary was attached December 21st, "after the close of school for the month and term." The February salary was attached February 29th, "after the close of school on that day and after the close of school for that month." The services had, therefore, in each instance been fully rendered. And if the money had been earned it became a debt, even though not payable till a later day, and could be taken by foreign attachment.

J. S. Seymour, for the defendant.

1. The salaries of public officers and all such profits as a man receives in respect to the performance of a public duty are, from their very nature, exempt from attachment and incapable of assignment. *Flarty v. Odum*, 3 T. R., 681;

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Lidderdale v. Duke of Montrose, 4 id., 248; *Arbuckle v. Cowtan*, 3 Bos. & Pul., 321; *Barwick v. Reade*, 1 H. Bla., 627; *Wells v. Foster*, 8 Mees. & Wels., 149; *Collyer v. Falton*, Turn. & Russ., 459; *Liverpool v. Wright*, 28 L. Jour., N. S., Cha., 868; *Buchanan v. Alexander*, 4 How., 20; *McLellan v. Young*, 54 Geo., 399; *Wallace v. Sawyer*, 54 Ind., 501; *Hawthorne v. St. Louis*, 11 Misso., 59; *Williams v. Boardman*, 9 Allen, 570; *Bliss v. Lawrence*, 58 N. York, 442; 1 Parsons on Cont., 194; 1 Wait's Act. & Defences, 361; 2 Story Eq. Jur. (12th ed.), § 1040 *e*.

2. A teacher in a public school of this state is a public servant, within the meaning of the law exempting the emoluments of those who perform public services from attachment. The public school system is a state establishment, grounded in the fundamental law. Const. of Conn., art. 8, sec. 2. The funds for the support of this system are public funds exclusively, derived almost exclusively from taxation, and in its support nearly half of the public moneys of the state are disbursed. The teacher may be chosen by a popular vote of the district, by ballot and check list. Gen. Statutes, p. 134, sec. 2; Acts of 1880, ch. 96, sec. 3. His duties and the qualifications he must possess are defined by statute and ascertained by a public board. Gen. Statutes, p. 132, sec. 1; id., p. 142, secs. 1, 2; Acts of 1875, ch. 59. His duties and obligations are of the highest character, on the faithful discharge of which depend, not merely the safety of the state, but the very existence of free institutions. But the decided cases sustain this proposition. *School District v. Gage*, 39 Mich., 484; *Hightower v. Slaton*, 54 Geo., 108; *State v. Mizner*, 50 Iowa, 145; *Lander v. Seaver*, 32 Verm., 114; *Spear v. Cummings*, 23 Pick., 224.

3. If Wigham's salary could be assigned, then it was assigned before the attempted attachments. All of these assignments were duly executed. If they were not effectual, it must have been so held on account of the fraudulent intent attributed to the parties by the court; and as to that intent we say it ought not to have been found at all because not pleaded. Rules under the Practice Act, p. 16, sec. 6.

4. The plaintiff took nothing by any of his attachments, because, at the time they were served, the school register had not been filled out for any part of the period for which his salary was attempted to be taken. Gen. Statutes, p. 143, sec. 2; Acts of 1875, ch. 59. This is a statutory prerequisite to the right to recover the salary, and if Wigham himself were suing for the money he would have to show that the statute had been complied with. His creditor, standing in his shoes, must take the same burden.

5. The engagement of Wigham with the district was an entire contract for one year, at a salary of \$1,200, and was incapable of apportionment. *McMillan v. Vanderlip*, 12 Johns., 165; *Reab v. Moor*, 19 id., 337; *Daily v. Jordan*, 2 Cush., 390. The intention and understanding of the parties referred to in the finding as to the manner of payment are not sufficient to incorporate those elements into the formal vote of the district, since it is not found that the parties so incorporated them. On the contrary it is explicitly found that there was no express contract other than that contained in the resolution itself. But were it otherwise, the district could not bind itself at that time to pay its teachers once a month, because the statute at that time provided that they should be paid at the end of each term, after it had been ascertained, and a certificate to that effect given, that the schools had been kept according to law, and does not provide any other time of payment. Gen. Statutes, p. 145, sec. 11. It has since been provided that teachers may be paid once a month. Acts of 1885, ch. 67. But that does not apply to this case.

6. If the salary could be apportioned at all, it could not be so apportioned that any salary for December could be attached on the 21st of December, or so that any salary for February could be attached on the 29th of February. If the intention and understanding of the parties were allowed to be of controlling force as to the time of payment, the finding is that \$120 should be paid at the end of each of the ten months of the school year. It is further found that both the 21st of December and the 29th of February were

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school days. And while it is found that the processes served respectively on these days were served after the close of school on these days, it is not found that the duties of the teacher were then ended for the month. Nor is there any presumption of law or fact that they were ended when the formal session of the school closed. Indeed the contrary appears to be the import of the finding, since the intention that \$120 should be paid at the end of each month cannot easily be made to mean that Wigham was entitled to it, and that he or anybody else could sue for it during the month. Both the orders for further attachment were therefore prematurely served.

CARPENTER, J. This is a suit of *scire facias*. A process of foreign attachment was served on the defendant, November 5th, 1883, as the trustee and debtor of one Wigham, a teacher in the defendant district, factorizing his salary for the month of October preceding. Afterwards his salary for December and February was factorized by service of two orders for further attachment, one served December 21st, 1883, the other February 29th, 1884. The Court of Common Pleas held the defendant liable as to the second and third attachments, and not liable as to the first or original attachment. Both parties appealed.

First, as to the plaintiff's appeal. On the 3d of November, 1883, the committee of the district drew an order on the treasurer thereof, payable to the order of Wigham, for his salary for the month of October, and delivered the same to him. The salary of Wigham was usually paid to him by such orders. On the same day Wigham indorsed the order in blank, and delivered it to S. E. Olmstead, who, in good faith, paid him the money thereon. None of the officers of the district were notified of the transfer to Olmstead until the treasurer paid the order to him on the 14th of December. When the factorizing process was served, November 5th, the treasurer disclosed to the officer an indebtedness of the district to Wigham in the sum of \$120.

The court overruled the claim of the plaintiff that the

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defendant was liable for the salary for October, and held that the delivery of the order to Wigham, transferred and paid as aforesaid, was in law a payment of the salary for the month of October before the first attachment by the plaintiff.

We think the facts stated are equivalent to an express finding that the order was given by the district and received by Wigham in payment. His salary was "usually paid to him by such orders." He had been in the employ of the district for more than two years, and was accustomed to receive his pay in orders on the treasurer. The district had adopted that mode of payment, in which Wigham acquiesced, and which was continued after the suits were brought. The salary for November was paid by a similar order; and so was the salary for each of the months of December, January and February following. That the parties intended by giving and receiving the order to give and receive a chose in action, evidence of an indebtedness, simply to change the form of the obligation, will not be presumed. It was a reasonable and convenient method of paying their bills. When an order was received the claim was liquidated and adjusted, and nothing remained to be done but to call upon the treasurer and receive the money. It was intended and understood by the parties *as payment*, as much so as receiving a town order or bank check. The order was regarded and treated as cash, not only by the parties, but by Olmstead, who received several of them. To regard it otherwise, to treat the indebtedness as still subsisting, would mislead and operate as a snare. When therefore the judge says that he overruled the claim of the plaintiff, and held that the order so given and paid was in law a payment, his language imports not merely a legal conclusion, but, taken in connection with the facts, an actual payment; especially as he made such payment the foundation of his judgment.

The supposed error is not manifest, and the judgment on the plaintiff's appeal is not reversed.

As to the defendant's appeal.

1. It is claimed that the court erred in holding that the

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teacher was not a public officer within the meaning of the law exempting the salaries of such officers from attachment. We think the court did not err in this respect. It will be noticed that the claim is not that the defendant is not liable as garnishee. That it may be so liable is practically conceded; and well it may be. In *Bray v. Wallingford*, 20 Conn., 416, it was expressly held that a town is so liable; and doubtless for the same reasons other territorial corporations would be liable. We think school districts in respect to all matters within the scope of their powers must stand upon the same footing.

But the claim is that Wigham's salary is exempt for his sake or on his account. It is true that he was serving the public in a matter of great public importance. But not every one serving the public can claim that his compensation therefor is exempt from attachment. Mechanics and laborers employed in erecting school buildings are serving the public, but their wages are not on that account exempt from attachment. A teacher is not an officer in the ordinary sense of the word. He is not usually elected or appointed, but is employed—contracted with. He has duties to perform incident to his employment, but they are not official duties and he is not under oath. We see no good reason why his salary should not be liable for his debts, in the same way as the compensation of others employed by the district.

The argument drawn from the general nature of our school system, the division of the territory of the state into school districts, the pains taken to secure suitable persons to perform the duties of teachers, the supervision provided for through the local and state boards of education, the large amount of taxes raised for the support of schools, &c., fails to convince us, in the absence of any statute to that effect, that the legislature intended that a teacher's salary should be exempt from attachment. The statute authorizing debts to be attached is broad and comprehensive. It makes no exceptions, and none exist unless found in cogent reasons of public policy. While it may be the policy in some states to exempt teachers from the operation

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of similar statutes, yet in this state the policy of the law has ever been to compel every man to pay his debts, and to that end to subject substantially all his property to attachment. That policy has its foundation in principles of justice, and before any class of persons can be declared exempt from its operation, reasons therefor of greater weight than those which support the policy must be shown. They have not been shown in this case.

2. It appears that Wigham assigned his salary for the months of December and February, by separate assignments, to Olmstead. These assignments in form complied with the requirements of the statute. Session Laws, 1878, p. 268. The second reason of appeal is that the court erred "in holding that said assignments were fraudulent or invalid on account of any fraudulent intent of the parties to them, in that no such issue was raised by the pleadings." The defendant's third defense alleges that the assignments were made to secure *bond fide* debts, as the statute requires, due from Wigham to Olmstead. That allegation is denied. On that issue the court found that "said assignments were neither given by said Wigham, nor received by said Olmstead, to secure a *bond fide* debt. They were given by said Wigham and taken by said Olmstead for the purpose of defeating the plaintiff's attachments, and for the purpose of securing to said Wigham his salary." We think that finding is responsive to the issue.

3. The defendant says that the court erred "in overruling the defendant's claim that the plaintiff took nothing by his attempted attachments, because it did not appear that said Wigham ever kept or filled out any school register, as required by law, or any register, or that he ever held a certificate from the school visitors of the town of Norwalk." The finding of the court is substantially as this reason assumes. Obviously there was no evidence on the subject either way.

This matter is in the pleadings only as it is involved in the question whether the defendant was indebted to Wigham. Upon the trial of that issue, with no evidence from

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either party as to the register and certificate, the court might well find an indebtedness, upon the principle that it will be presumed that the law was complied with until the contrary appears.

4. The fourth reason is, that the court erred "in holding that the salary of said Wigham was apportionable or divisible, on the compulsion of said Wigham or of any attaching creditor."

The vote of the district was—"that the district employ Mr. H. B. Wigham as principal at the same salary as last year." And it is found that Wigham accepted the offer of employment made under that resolution, and that no express contract of employment other than that above stated was proved.

But the court further found as follows:—"From said resolution, and from the knowledge of the parties of the manner of the payment of the salary during the previous year, and from the manner of the payment to said Wigham during said school year of 1883, I find that it was the intention and understanding of said contracting parties that said Wigham should be paid \$120 a month for the ten months of said school year of 1883, and that the same should be paid at the end of each of said months."

This finding does not seem to be inconsistent with the vote of the district, and it effectually disposes of the question of apportionment.

5. The next reason is that the court erred "in holding that, if apportionable at all, it could be apportioned so that at the time of the attempted attachments any sum was due or subject to attachment beyond the amounts theretofore paid to said Wigham."

Under this reason it is claimed that the salary for December was not due on the 21st day of the month, when the second attachment was served, and that the salary for February was not due on the 29th of that month, when the third attachment was served; and therefore that the plaintiff took nothing by those attachments.

We think this claim is untenable. All the service that

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Wigham was required to render during those months had been rendered. His salary had been earned and the debt existed. Whether payable then or afterwards was immaterial. An existing debt is liable to attachment although it may not be presently payable.

6. The last error assigned is, that the court erred "in finding the material facts of the defendant's second defense true, and yet rendering judgment for the plaintiff, in that no issue of law on that defense was raised by the pleadings."

The vital point in this defense is that Wigham was a "public officer." It is not claimed that the other facts therein stated without this constituted any defense. The court found in effect that the allegation was not true in law or in fact. That negatives the defense, and the court committed no error in so deciding.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

SUPREME COURT OF ERRORS,
HELD AT NEW HAVEN, FOR THE COUNTY OF
NEW HAVEN,

ON THE FIRST TUESDAY OF DECEMBER, 1885.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

JOHN BURKE *vs.* PHILIP GRACE.

53	513
71	652
53	513
172	700

Where an appeal is authorized "when the matter in demand exceeds the sum of five hundred dollars stated in the writ," a suit brought to recover possession of real estate and five hundred dollars damages does not become appealable by reason of the value of the demanded premises.

The District Court of Waterbury in New Haven County has by statute jurisdiction in all cases in law and equity in which either party resides in certain of the neighboring towns in Litchfield County. Held that the jurisdiction of the court extended to actions to recover possession of lands in such towns.

[Argued December 1st—decided December 20th, 1885.]

ACTION to recover possession of real estate and damages; brought to the District Court of the district of Waterbury, and appealed by the defendant from the judgment of that court to the Superior Court. In the latter court the plaintiff moved that the case be erased from the docket, which motion the court (*Sanford, J.*) granted. Appeal by the defendant to this court. The case is fully stated in the opinion.

G. E. Terry, for the appellant.

J. O'Neill, Jr., and *J. J. Jennings*, for the appellee.

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LOOMIS, J. This is a complaint in ejectment to recover the possession of premises situated in Thomaston, Litchfield County, originally brought to the District Court of Waterbury, demanding five hundred dollars damages and possession. The plaintiff recovered judgment in the District Court and the defendant appealed to the Superior Court, where, on the plaintiff's motion, the case was erased from the docket for want of jurisdiction. The motion was based on two grounds:—

1st. That the matter in demand as stated in the complaint was too small to allow an appeal.

2d. That the land which was the subject matter of the action, being situated in Litchfield County, the District Court of Waterbury in New Haven County had no jurisdiction.

1. Was the matter in demand, as stated in the complaint, sufficient in amount to entitle the defendant to an appeal?

The answer will depend entirely upon the construction which should be given to the statute, which provides that "an appeal may be had from any final judgment rendered in said court when the matter in demand exceeds the sum of five hundred dollars, as stated in the writ or declaration when returned to said court, to the next term of the Superior Court for New Haven County, holden at Waterbury." Private Acts of 1879, p. 155.

Under this act the right of appeal depends not at all upon any finding by the court as to the value of the matter in demand, but solely upon the statement of amount as it appears in the complaint as returned to court. All other evidence of the amount must therefore of necessity be excluded. The amount is something to be seen on the face of the writ, and is not to be determined in any other mode. But the defendant seeks to supplement the stated amount by some presumed amount in addition, arising from the nature of the subject matter. His argument in substance is, that the complaint seeks to recover five hundred dollars and the possession of the land, and that as the latter is pre-

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sumably worth something, the matter in demand is something more than five hundred dollars. But the act requires a sum stated in the writ exceeding five hundred dollars. No sum whatever exceeding that is stated; it is not even mentioned that there is something more to be presumed. But we think the fair import of the language excludes all evidence, whether direct or presumptive, as to the amount, and that in requiring that the matter in demand must "exceed the sum of five hundred dollars as stated," a sum in money value exceeding that limit must be stated to authorize an appeal.

But the case of *Sullivan v. Vail*, 42 Conn., 90, was cited by the defendant as authority for his claim that we should add to the amount stated some presumed value attaching to the possession of the premises; and a detached passage from the opinion gave color to the claim. But the passage relied upon was used by way of an admission expressly stated to be for the sake of argument. The position taken was simply that, even if the value could otherwise be added to the damages claimed, no value could be presumed for the purpose of ousting the jurisdiction. It seems to us therefore that even this part of the opinion is more against the defendant than for him; for the court there refused to do what this court is asked to do. It is true the reason for refusal in that case may possibly be regarded as stronger than it is here. In that case it was said that the effect of adding the presumed value would have been to oust jurisdiction, while in this case it saves jurisdiction. If this were true, it should not be assumed that the proposition laid down by the court was equivalent to saying that the presumed value would be added to the value stated in all other cases. The court contented itself by simply using the strongest reason applicable to that case. The consequences there would indeed have been serious, but in the present case it does not defeat the action, it simply leaves the judgment of the District Court in full force and avoids a protracted trial in the Superior Court. The real position of that case as to jurisdiction was indeed quite similar to this.

There the Court of Common Pleas had under the statute exclusive jurisdiction "when the matter in demand exceeded one hundred dollars and did not exceed five hundred dollars," and as the writ in that case demanded three hundred dollars, on the face of it that court had exclusive jurisdiction. In the present case, on the face of a complaint with similar allegations, the District Court had exclusive jurisdiction. If then the exclusive jurisdiction of the Common Pleas could not be ousted by adding a presumption, why should it be done as to the District Court indirectly by conferring appellate jurisdiction on the Superior Court. But a comparison of the statutes applicable respectively to that case and this, will show that the reason is in fact much stronger against applying the presumption to the present case. The act that controlled the former case specified the amount of the matter in demand as the test of jurisdiction, without any words indicating that extrinsic evidence could not be introduced to show the real amount, while in this case, as we have already seen, the right of appeal is, in terms, restricted to the "amount stated in the writ."

But it hardly needs so much discussion to show that *Sullivan v. Vail* is no authority for the position taken by the defendant, for the authorities from our own court there cited with approval all hold in substance that the matter in demand, even under statutes like the one applying to that case, is to be determined by what appears on the face of the declaration, and that testimony has never been considered a test of jurisdiction; and the opinion concludes with the remark that "the value of the land sued for is no necessary part of the case. Any evidence regarding it is unnecessary and superfluous, unless it is made material and put in issue by a plea to the jurisdiction."

For these reasons we think there was no appellate jurisdiction of the case on the part of the Superior Court.

2. This result renders immaterial the other question presented by the record, whether the District Court of Waterbury had jurisdiction to hear and decide on the title to land situated in Thomaston, but inasmuch as an avoidance of

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this question might cast doubt on the validity of the plaintiff's judgment, we will add that the case of *Curtiss v. Atwood*, 51 Conn., 169, must be considered as controlling. Here, as in that case, one of the parties resided in the town where the land lay. We do not see why the statute conferring jurisdiction on that court does not include complaints for disseisin as well as trespass to land. There was in the statute as it existed prior to 1867 a clause restricting the jurisdiction to cases "wherein the title to land is not concerned." The omission of this qualification in the present act is therefore very significant, and the general words conferring jurisdiction must therefore have their full ordinary import.

There was no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

MARTIN MYERS, TRUSTEE, *vs.* JOHN J. JACQUES AND
OTHERS.

Money borrowed by an association for constructing a park held not to be a special fund on which the parties who had furnished labor and material for the park had a lien, although the association had no other property, and had since gone into insolvency; no such lien having been agreed upon, and the money having been used in good faith in paying the note given for the loan.

Money in the hands of a debtor is at his absolute disposal in the payment of his debts, subject only to the interposition of other creditors under the insolvent law.

And held that it did not affect the case that the president, secretary and treasurer of the association, who used the money to pay the loan, were themselves, with others, guarantors of the note given for the loan, and paid it without obtaining a vote of the association or of the executive committee directing the payment, it being found that they acted in good faith.

[Argued December 1st—decided December 29th, 1885.]

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ACTION by the plaintiff as trustee in insolvency of the Farmers and Mechanics' Association to recover funds claimed to belong to the association; brought to the Superior Court, and tried to the court before *Sanford, J.* Facts found and judgment rendered for the defendants, and appeal by the plaintiff. The case is sufficiently stated in the opinion.

G. E. Terry and *J. O'Neill, Jr.*, for the appellant.

1. The association did not authorize these defendants, nor any other persons, to return the \$3,000 which was in the treasury for the purpose of constructing a race track. The building committee reported that it had better be returned, but no vote was passed authorizing its return.

2. The \$3,000 was a trust fund, raised for the special purpose of constructing a race track. It was raised in a special manner. It was not raised by an assessment on the members; nor by laying taxes; nor by a voluntary subscription from the members; but a committee was appointed to adopt some scheme to raise the money. The association had no money in the treasury. Its charter does not authorize it to lay taxes nor to assess its members. The committee appointed devised the plan of a note which the officers of the association signed in behalf of the association (though it does not appear that they were authorized to do so by the association), and then procured the signatures of some ninety different persons (one of whom at least, the defendant Jacques, was not even a member of the association) to a special guaranty. This trust fund, therefore, could not be devoted to any other purpose than that for which it was subscribed, even by the association. *Langdon v. Plymouth Congregational So.*, 12 Conn., 122; *Bigelow v. Congregational So.*, 11 Verm., 283; *S. C.*, 15 id., 370. The majority of the subscribers even could not use that fund for any other purpose than that for which it was contributed. *Abels v. McKeen*, 18 N. Jer. Eq., 462. In the case from 12th Conn., above cited, it was held that where a fund was raised by subscription, and was in the hands of

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the defendant as trustee, the returning of this fund by him to the subscribers was a breach of duty by the trustee, and an injunction was issued restraining him. In the Vermont case cited a fund was raised to pay the minister's salary. The members of the society expended the fund in contesting his right to the salary. A court of equity compelled the individual members, who assented to this expenditure of the fund, to pay the minister's claim out of their own pockets.

3. The executive committee of the association, by its by-laws, have the management of all the affairs of the society; and not less than five members of the committee are required to constitute a quorum. Only three members of the committee were present when the return of this \$3,000 was authorized, namely, the president, the treasurer, and the secretary. Jacques, the other defendant, was present and advising these officers when they concluded to return the money. He was one of the committee appointed by the association to build the track. He reported to the meeting of the association that this money ought to be returned, and he reported to the same meeting that he would have nothing further to do with the construction of the track. The order for this \$3,000 was payable to him, and he was the man who took the money and handed it over to the lender. The executive committee was not formally called together for the purpose of acting on the matter, nor was a quorum of the committee ever present advising the return of the money. It does not appear from the record that any five members of the committee, either when present together as a committee, or each acting independently, consented to the return of the money. The by-laws of the association conferred on the executive committee, not on five members, the power to act. They also provide that five members shall constitute a quorum. This means, of course, that when any act is to be done, all the members of the committee shall be notified to be present, and that if five are present, these five may lawfully act. But if all the members were notified to be present, and a quorum of five

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was actually present, a majority of these five could not perform a lawful act. A power conferred upon two or more individuals for private purposes must be executed by all, unless it be provided by the act conferring the power that a less number may execute it. *Patterson v. Leavitt*, 4 Conn., 53; *Middletown v. Berlin*, 18 id., 197. The rule that an authority imposed by law on three or more persons for public purposes, and especially for purposes of a judicial character, may be executed by a majority, if all have been legally notified to act, has no application to the case before us, because this authority is not imposed by law, nor for public purposes, but is conferred by a private corporation, for private purposes, on private individuals. *Patterson v. Leavitt*, supra; *Middletown v. Berlin*, supra; *Crone v. Daniels*, 20 Conn., 333; *Groton v. Hurlburt*, 22 id., 178; *Gallup v. Tracy*, 25 id., 17; *Hine v. City of New Haven*, 40 id., 478; 9 English Reps., Moak's Notes, 281. The fact that these defendants acted in good faith did not make their act legal. It was legal fraud as distinguished from actual fraud.

4. Each of these defendants guaranteed the payment of this \$3,000. They were all of them pecuniarily interested in the payment of this note. These men could not, therefore, legally act in returning that money, and by so doing relieve themselves from responsibility. *Board of Supervisors v. Hall*, 47 Wis., 208; *Hopkins's Appeal*, 90 Penn. St., 69.

C. M. Joslyn and *E. F. Cole*, for the appellees.

PARDEE, J. The Farmers and Mechanics' Association of Waterbury voted to construct a park for fairs. The money for that purpose was obtained as follows:—Its president, secretary and treasurer made a note for \$3,000, dated May 18th. 1880, payable to it on demand with interest semi-annually. The defendants, Jacques, Parsons and Hall, with about eighty other persons, signed the following writing upon the back of the note: "We, the undersigned,

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hereby guarantee the payment of sixty dollars upon the above note until the same is paid in full." Upon this note Root, the president, borrowed \$3,000 of one Dr. Shove, and placed the same in the hands of the treasurer. Subsequently a committee appointed by the association made a contract in its behalf with Thomas Martin for the construction of a trotting course, to be completed on or before August 10th, 1880, to the acceptance of the committee. Martin performed work upon his contract, but has not completed it to their acceptance. On December 7th, 1880, the committee reported to the association his non-performance of contract; also that inasmuch as the borrowed money was drawing interest, it would be best to repay it and borrow again when necessary. Neither the association nor the executive committee passed any vote upon the subject of repayment. About ten days thereafter Hall, the secretary of the association, drew an order for \$3,000 upon Parsons, the treasurer, in favor of Jacques, not a member of the association, but of the committee appointed to procure the construction of the track. These persons are made defendants. The treasurer paid the money to Jacques, and he caused it to be returned to the lender.

In April, 1881, the association became indebted to A. L. Peck in the sum of about \$800 for lumber for a fence, and to G. Tracy in the sum of about \$400 for labor in erecting it.

Since September, 1881, the association has been in insolvency, and the plaintiff is its trustee. He complains substantially as follows: "The plaintiff says that he needs said fund so raised as aforesaid, together with the other moneys of the said association, for the purpose of paying said Martin, Peck and Tracy. That on or about the 18th day of December, 1880, the defendants fraudulently and wrongfully combined, conspired and agreed together to convey away the above mentioned funds so raised as aforesaid for the purpose of paying for said track and fence, together with the other money in said association's treasury; and for the purpose aforesaid fraudulently and wrongfully,

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and without any authority of said association, or from its proper committee or officers, drew a certain order on the said association's treasurer, pretending and purporting to be the order of the said association for the sum of \$3,000; and then and there, on or about said 18th day of December, 1880, with the said order so fraudulently drawn and issued as aforesaid, procured from said treasurer said above mentioned money, and then and there converted and disposed of the same to their own use."

The defendants had judgment. The plaintiff appeals for reasons substantially as follows:—"That the court erred in deciding that said \$3,000 borrowed was not a special fund raised for the construction of said park; and in further deciding that the said fund could be taken and used for the purpose of paying other debts of said association than those contracted for the construction of said park, at least until after said park expenses were first paid. Also in deciding that three members of the executive committee of said association could appropriate said \$3,000 to the payment of said claims to Dr. Shove, provided they acted in good faith in so doing. Also in deciding that three members of the executive committee, each one of whom was personally and individually liable as guarantor on said \$3,000 note, had the power to appropriate the said \$3,000 so in the treasury to the payment of said note on which they were guarantors, and that where they had a personal interest they were qualified to act."

If we should concede that when the treasurer of the association paid its debt for borrowed money it also was indebted to Martin, the plaintiff would remain without cause of action. Although the payment of the debt due from the association was made by the custodian of its money without any special direction from it, yet the act gave neither to it, nor to its trustee in insolvency as the agent of its creditors, any right of action against him. For it is the legal duty of a debtor to pay matured obligations, and his right to pay such as have not matured with the creditor's assent; the investment is absolutely safe; pre-

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sumptively it is to the advantage of a debtor to free himself from debt; presumptively the agent who applies his principal's money upon the principal's debt benefits him; and there is no finding that the payment injured this association. The fact that the treasurer and his co-defendants were guarantors of the debt discharged does not vary the case; the legal significance of that fact, if it has any, is exhausted upon the question of good faith; and the finding is that the payment was made in good faith, upon the belief that it would be for the benefit of the association. Upon the facts the money of the association in the hands of its treasurer was at its absolute disposal, subject only to the interposition of creditors under the insolvent law within sixty days after a payment to a preferred creditor; and it was none the less so that its debts equalled its assets. No matter how confidently a creditor may rely upon the fact that his debtor has money sufficient to pay him; no matter, indeed, what promises the debtor may make as to payment; he thereby obtains no lien upon the money; no trust to the exclusion of other creditors is stamped upon it in his favor, of which either law or equity will take cognizance. As a matter of law it is exposed to seizure by another creditor more vigilant, or reception by one more favored. The law does not lift any creditor to a place of preference who simply trusts his debtor.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

THE TOWN OF NAUGATUCK vs. ARTHUR W. SMITH.

A proceeding under the bastardy act (Gen. Statutes, p. 439, secs. 1, 4,) is in form criminal but in its nature civil.

The justice of the peace before whom the case is primarily brought can only bind the defendant over to the higher court, which court can acquire jurisdiction only by this proceeding.

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If a plea in abatement is filed before the justice there is no appeal by the defendant from an adverse decision upon it; but the practice is to allow him to renew his objection in the higher court.

The statute provides that on a binding over the justice shall commit the defendant on his failure to give bond for his appearance before the higher court, but this is wholly for the security of the plaintiff and the failure of the justice to commit does not invalidate the binding over.

In the higher court the presence of the defendant is not necessary to its jurisdiction, but the case may be heard and decided in his absence.

[Argued December 1st—decided December 18th, 1885.]

COMPLAINT under the bastardy act; brought before a justice of the peace by the selectmen of the plaintiff town. The defendant was bound over by the justice to the District Court of the district of Waterbury, which court (*Bradstreet, J.*) found him guilty. He then appealed the case to the Superior Court for New Haven County, which court (*Torrance, J.*) affirmed the judgment. The defendant then appealed from the last judgment to this court. The case is fully stated in the opinion.

H. C. Baldwin, for the appellant.

J. O'Neill, Jr., for the appellee.

CARPENTER, J. This is a complaint under the statute relating to bastardy. Gen. Statutes, p. 469, secs. 1, 4. The defendant was brought before a justice of the peace; upon an adjournment he gave bonds for his appearance; he appeared, and filed a plea in abatement. The issue on that plea was decided against him. He then moved for an appeal to the District Court of Waterbury, and offered sufficient bonds; but the justice decided that unless he would enter into a bond with sufficient surety in the sum of one thousand dollars, conditioned to prosecute his appeal to effect, and also conditioned to appear personally before the District Court and abide the order of the court in the cause, the appeal would not be allowed. The defendant refused to enter into such bond. Thereupon the court decided that

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probable grounds existed for the support of the complaint and ordered the defendant to become bound with surety in the sum of one thousand dollars conditioned that he appear before the District Court. The defendant refused to give such a bond.

Without committing the defendant for want of bonds the justice transmitted copies to the District Court, which were duly entered in the docket thereof, and at the next term, the defendant not appearing, he was defaulted, and, upon hearing had, judgment was rendered for the plaintiff. At the same term and after judgment the defendant appeared in court and appealed to the Superior Court, alleging errors.

A party in default is not ordinarily supposed to be in court for the purpose of appealing from the judgment against him. But the irregularity seems to have been waived, and the Superior Court found no error, and rendered judgment for the appellee.

Two reasons of appeal are alleged, both of which, in effect, deny the jurisdiction of the District Court:—

1. That the justice had no power to find probable cause after the defendant had moved for an appeal from the judgment on the plea in abatement and offered sufficient bonds; and
2. That the District Court erred in proceeding to and rendering judgment as upon a default when the defendant was not before the court.

First, as to the power and duty of the justice. The proceeding is purely statutory. In form it possesses many of the features of a criminal prosecution; in substance it is a proceeding to enforce a civil remedy. It is a special proceeding provided by statute, and is peculiar to this class of cases. The justice has not final jurisdiction; consequently he can render no final judgment. The sole issue, so far as the merits of the case are concerned, is prescribed by statute—the finding of probable cause. Gen. Statutes, p. 469, sec. 1. If a dilatory plea is interposed, as it was in this case, the justice has power incidentally to dispose of it. If

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the plea is overruled the statutory issue remains to be tried, and it is the duty of the justice to try it. That seems to be essential in order to give the higher court jurisdiction. Although final jurisdiction was exclusively in the District Court, yet that jurisdiction was not strictly original. It could take it only as handed to it by a justice of the peace in the statutory manner. The statute does not provide for an appeal from an adverse decision on a plea in abatement. Such a provision would be inconsistent with the general scope and intent of the statute. The general statute relating to appeals, (Gen. Statutes, p. 415, sec. 15,) has reference to causes within the jurisdiction of justices of the peace, and has no application to a case like this, where the justice can only bind over to a higher tribunal. The analogy between this case and criminal cases, in which the justice can only bind over, is striking. In such cases an appeal from a judgment on a plea in abatement is unknown to our practice.

It does not follow however that the defendant may not have the judgment on such a plea reviewed in the higher court. We believe the practice to have been to allow him to renew the objection there. *Davis v. Salisbury*, 1 Day, 278; *Chaplin v. Huntington*, 6 Conn., 41. In *Hinman v. Taylor*, 2 Conn., 357, and in *Hopkins v. Plainfield*, 7 Conn., 286, the defendant pleaded in abatement in the County Court. Thus far therefore the proceeding before the justice was regular and proper.

We come now to the second objection, which is that the District Court had no jurisdiction. This objection rests upon the fact that the justice did not commit the defendant for want of bonds. We agree that that is the regular mode pointed out by statute in which the body of the defendant is detained; but his detention is for the plaintiff's security and not for the purpose of retaining jurisdiction. If that is not resorted to the defendant may abscond, and the plaintiff may lose all means of enforcing the judgment. The plaintiff however runs all the risk; the defendant may gain, but he risks nothing by not being committed. He there-

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fore is not in a condition to complain. The provision is for the benefit of the plaintiff and he may waive it.

In the District Court the presence of the defendant in court is not essential to its jurisdiction. In that respect it is unlike a criminal prosecution. It closely resembles a civil suit in actions for tort, in which the body may be arrested and held to respond to the judgment. The arrest and detention of the body are for security and not to give jurisdiction. If he is not arrested, or, if arrested and special bail is given, he may, if he chooses, absent himself, and the trial may well proceed without him. He has a right to be there, but it is a privilege which he may waive. By waiving it he in no manner impairs or affects injuriously the plaintiff's rights.

Moreover, it is apparent that he was not altogether absent. At each time when an order for his arrest was asked for counsel interceded in his behalf. A motion was made in his interest to erase the case from the docket for want of jurisdiction; and when judgment was rendered against him he was promptly present for the purpose of appealing. With these facts before us perhaps he might properly be regarded as present, if necessary, for all purposes. But it is not necessary, for jurisdiction did not depend upon his presence.

There is no error.

In this opinion the other judges concurred.

GEORGE H. PERRY, JR. *vs.* JAMES REYNOLDS AND OTHERS.

The selectmen and town clerk are by the constitution of the state (art. 6, sec. 5,) a board of registration in each town to decide on the qualifications and admission of electors in such town. Held that they are *quasi* judicial officers, and exempt from liability for their action so long as they act in good faith and within their jurisdiction.

A man twenty-five years of age, whose parents lived in another state, and

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who had left his home with them with no intention of returning and was not aided by them in his support, had resided for more than a year in New Haven as a student in a theological school, a part of the time teaching and preaching there and in the vicinity, and intending to make that the place of his residence until he had completed his studies and obtained employment elsewhere. Held to be domiciled in New Haven and entitled to admission as an elector there.

[Argued December 2d—decided December 29th, 1885.]

ACTION against the defendants as selectmen and town clerk of the town of New Haven, for refusing to admit the plaintiff as an elector; brought to the Court of Common Pleas.

The complaint alleged that, on the 20th day of October, 1884, the plaintiff was a male citizen of the United States, twenty-five years of age; that he had resided in the state of Connecticut for one year, and in the town of New Haven for six months, next preceding that date, and that he had all the qualifications required by the constitution for becoming a voter in the town of New Haven; that on the 16th day of October, 1884, his name was duly registered, under the title "To be made," for the first ward of the town of New Haven, and so remained down to and including the 27th day of said October, and that a duly certified copy of the list was in the possession of the selectmen and town clerk of the town from the 20th to the 27th of said October; that the selectmen and town clerk constituted a board provided by the constitution to decide on the qualifications of persons applying to be admitted as electors; that on the 20th of said October the plaintiff offered himself before the board to be admitted an elector, the defendants then sitting and acting as members of the board for the admission of electors; that the plaintiff was then prepared and ready to prove before the board that he had all the necessary qualifications, and being duly sworn did then make oath to the necessary facts, but that the defendants, after hearing his evidence, decided not to admit him as an elector; and that the defendants by their acts aforesaid had wrongfully and unlawfully deprived him of the enjoyment of his rights as a citizen of the state and of the United States.

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A second count set forth more particularly the facts with regard to his residence in New Haven, as follows:—

The plaintiff on the day when he presented himself before the board for the admission of electors in October, 1884, testified that for more than one year prior thereto he had been pursuing theological studies in the divinity school connected with Yale College, and during a portion of that time had been engaged in business, teaching and preaching in New Haven and vicinity; that he had parents residing in the state of Kansas, and that since the month of September, 1883, he had not had any residence or actual home with his parents, and had no intention of treating the residence of his parents as his residence; and that, during all the time since September, 1883, and down to and including the month of November, 1884, he intended to make the town of New Haven his residence until such a time as he should have completed his studies in said divinity school, and until such time thereafter as he might find it convenient, and until he obtained employment either in or out of said town of New Haven as might seem to him advisable when his studies were completed, and that he did not depend on his parents for support, and was then residing and pursuing his studies in the town of New Haven.

Three of the defendants filed an answer averring that they voted in favor of admitting the plaintiff; the others, five in number, demurred to the complaint, and the case was reserved, on the demurrer, for the advice of this court.

C. R. Ingersoll and *W. K. Townsend*, in support of the demurrer.

The act of the defendants which the complaint charges to be wrongful and a legal injury to the plaintiff, was an act done while "the defendants were then sitting and acting as members of the board for the admission of electors." And the act complained of is that "when the plaintiff offered himself to be admitted to the privileges of an elector, the defendants, after hearing the evidence offered by him, decided not to admit him, and refused to permit him

to take the oath prescribed by law in such cases." What the plaintiff testified to on that occasion is of no consequence. The defendants acting in their official capacity under the constitution of the state, heard his testimony and all the other evidence offered by the plaintiff, and then, as it was their duty to do, decided the case. They decided against the claim of the plaintiff, and this is his only complaint.

The constitution of the state has made the selectmen and town clerk the sole judges of the qualifications of electors, and their duties are of a judicial nature. *Freeman v. Selectmen of New Haven*, 84 Conn., 415. Such public officers cannot be made responsible in a civil suit, so long as their acts complained of are within the jurisdiction conferred upon them by the law. "I prefer to place the decision upon the broad ground that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors and all public officers, whatever name they may bear, in the exercise of judicial power. It, of course, applies only when the judge or officer has jurisdiction of the particular case and was authorized to determine it. If he transcended the limit of his authority, he necessarily ceases in the particular case to act as a judge, and is responsible for all consequences. But with these limitations the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable." *Weaver v. Devendorf*, 8 Denio, 120.

But in the present case there is no complaint of any wanton or malicious or corrupt or in any way improper motive. Much less is there any complaint of any extra-judicial act. The object of the constitutional provision making "the selectmen and town clerks of the several towns" the sole

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judges of the qualifications of electors, was to place that duty beyond the control or interference of any other department of the state government. And even in those states without the peculiar electoral system of Connecticut, a civil action against election officers is not allowed, except for malicious and wanton acts in abuse of their authority. The statutory provisions of Massachusetts in this respect are exceptional. *McCrary on Elections*, § 494 *et seq.*

L. Harrison, contra.

1. The board for admission of electors possesses no arbitrary powers. It is only a quasi judicial tribunal. It is governed by a plain rule prescribed in the constitution. It must construe and carry out that rule according to settled interpretations of language and decisions of the courts, and the members are liable for any plain violations of their duty. It is a fundamental principle that an elector shall not be deprived of his vote. *Cooley's Const. Lim.*, 616. The safety of our government depends upon the protection of the elector in his rights as such. If he is deprived of them he suffers the most grievous wrong. It is not sufficient to tell him he must suffer this wrong and remain remediless until he can show malice on the part of the election officers who have deprived him of his vote. He is entitled to a civil remedy whenever through ignorance, incapacity, prejudice, negligence or wilfulness, he is subjected to the loss of his vote. *Freeman v. Selectmen of New Haven*, 34 Conn., 415; *Sanders v. Getchell*, 76 Maine, 158; *Kilham v. Ward*, 2 Mass., 236; *Gardner v. Ward*, 2 id., 244, note; *Lincoln v. Hapgood*, 11 id., 350; *Capen v. Foster*, 12 Pick., 485; *Gates v. Neal*, 23 id., 808; *Blanchard v. Stearns*, 5 Met., 298; *Jeffries v. Ankeny*, 11 Ohio, 372; *Monroe v. Collins*, 17 Ohio St., 665; *Gillespie v. Palmer*, 20 Wis., 544; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246; *Stratford v. Sanford*, 9 Conn., 275. The constitution of Connecticut does not protect the selectmen and town clerk against civil actions for wilful, ignorant or plain violations of their duty to any greater extent than do the constitutions or laws of

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Maine, Massachusetts, Ohio, Wisconsin or Iowa. The fact that the authority given to them is in the constitution makes the argument for them no stronger than if it were only a part of the statute law. It is only a little more difficult to alter the one than the other, but in all other respects the former is no broader shield than the latter. While this court has held in *Freeman v. Selectmen of New Haven*, (supra,) that there is no remedy by mandamus to compel the board to admit an elector, it has suggested that the duties of the board may not be judicial in the strict sense of the word, and while they ought not to be interfered with "so long as they act fairly," this court added—"If they act wantonly or maliciously, they may be liable to the party injured, but not in this form of proceeding." The facts admitted by the demurrer in this case show that the defendants did not act fairly. They show conclusively a wilful denial of his rights to the plaintiff, evidently because he was a student. This was a wanton exercise of power and abuse of authority. While it is not claimed to have been malicious in the ordinary use of that word, it discloses a state of proceedings which this court should not hesitate to review. If this case cannot be inquired into so that this court may, if necessary, differ from the defendants in opinion, then the other provisions of our constitution to support a free and equal suffrage are made void, and every elector is hereafter at the mercy of a partisan majority without appeal and without remedy. The power to "decide on the qualifications of electors" conferred by sec. 5, art. 6, of the constitution, is only a power to decide subject to the rule of the constitution. The constitution enumerates the qualifications; they are not subject to the arbitrary will of the board. The qualifications requisite are age, sex, citizenship, residence for a certain period, ability to read, and character. The board cannot alter these in any manner. They cannot exercise their discretion one iota as to these. Age and sex and citizenship are simple facts. If they arbitrarily find an applicant not of age when he is twenty-one, a female when he is a male, an alien when he is a citizen,

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would not this court review the proceedings? If the applicant can read, and has a good moral character, there being no evidence to the contrary, can the board arbitrarily find otherwise and exclude him? And if they do, will not this court express its difference of opinion? What constitutes residence is a simple matter to determine as a question of law. The members of the board are bound to know what the law of domicile and residence is. If they ignorantly or wilfully find that a given state of facts constitutes no residence, when as a matter of law it does, can they reject the applicant and shield themselves in this court under the plea of "judicial authority?"

2. The plaintiff upon the facts was entitled to admission. The only question made was with regard to his residence. The rules of law governing questions of domicile and legal residence are substantially the same, and the cases that apply to one will usually apply to the other. Questions of domicile are raised in connection with the jurisdiction of courts and the settlement of estates. Questions of residence are raised in connection with the holding of office and the right to vote. Both are governed very much by the intention of the party. There can be no iron-clad rule laid down that the intention and the residence can only be shown by particular acts of the party claiming a residence. No particular acts of a party can be said to contradict conclusively the alleged intention of the party, unless such acts clearly show that the alleged intention is false. In every case the acts of the party and the facts in the case must be considered on their merits in connection with the declared intention. But the declared intention should always prevail, unless the acts of the party or the facts in the case clearly show that the declared intention cannot be true. *McCrary on Elections*, §§ 38-41, 71; *Chase v. Miller*, 41 Penn. St., 404; *Miller v. Thompson*, 1 Bartlett's Cont. Elec. Cases, 118; *People v. Holden*, 28 Cal., 123; *State v. Judge, &c.*, 13 Ala., 806; *Lincoln v. Hapgood*, 11 Mass., 350. The intention of the party is held to be the all important consideration in questions of domicile as well as residence.

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Grant v. Dalliber, 11 Conn., 238; *Salem v. Lyme*, 29 id., 80; *Clinton v. Westbrook*, 38 id., 12; *Culver's Appeal from Probate*, 48 id., 171; *State v. Frest*, 4 Harr., 558; *McDaniel's Case*, 2 Penn. L. J., 310; *The Venus*, 8 Cranch, 278. Every person must have a domicile somewhere. *First Nat. Bank v. Balcolm*, 35 Conn., 358; *Abington v. North Bridge-water*, 23 Pick., 170. And this rule applies to a single as well as to a married man. *French v. Lightly*, 9 Ind., 478. In this case it is admitted that the plaintiff had parted with his residence of origin, for he had no residence with his parents. He had been emancipated four years at least, for he was twenty five years of age, and did not depend on his parents for support. If his residence was not in New Haven, where was it? It was not with his parents; that is admitted. It could not be in any other place than New Haven, for his bodily presence had been in New Haven from September, 1883, to November, 1884. He had no intention to have a domicile anywhere else, for it was his intention to treat New Haven as his residence. He could not hold any former domicile by an intention to return, for it is admitted that it is his intention to go to some indefinite place, or remain in New Haven, as may seem advisable, when his studies are completed.

CARPENTER, J. The plaintiff applied to the board of registration to be admitted an elector. The board heard the evidence as to his qualifications, and refused to admit him; and that is the wrong complained of, for which this suit is brought against the members of the board. A majority of the defendants demurred to the complaint, and on that issue the case was reserved for our advice. The question relates to the residence of the plaintiff. Upon the evidence it seems clear that his only domicile was in New Haven, and that he should have been admitted. If that was the only question involved in the case the demurrer should be overruled; but the question is whether the defendants, acting strictly within their jurisdiction, and without malice or wilful disregard of their duty, can be held liable.

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The constitution prescribes the qualifications of electors, and constitutes the selectmen and town clerk of each town the tribunal to decide on those qualifications. In doing so they hear testimony, weigh it, and decide. Thus they act judicially. They are quasi judicial officers. *Freeman v. Selectmen of New Haven*, 84 Conn., 415. The general rule is that such officers are not liable for errors or mistakes, but there are exceptions. In Massachusetts it is held that selectmen are liable in such cases without averring or proving malice. In *Lincoln v. Hapgood*, 11 Mass., 850, PARKER, C. J., after stating that he had for some time entertained a different opinion, says that "however hard such an action may be against selectmen, it is essential to the rights of the citizen that it should be sustained." The argument is, first, that the citizen has no other remedy; second, that "the good of society, and security against a repetition of the wrong, require that the suffering party should be permitted to resort to this mode of relief"; and third, that a man may otherwise be prevented for his life from exercising a constitutional privilege. In *Capen v. Foster*, 12 Pick., 485, SHAW, C. J., says that "it has been decided upon great considerations of public policy that such an action may be sustained."

The same rule prevails in Wisconsin and Ohio. *Gillespie v. Palmer*, 20 Wis., 544; *Jeffreys v. Ankeny*, 11 Ohio, 372; *Monroe v. Collins*, 17 Ohio St., 665. In the Wisconsin case however the defendant was merely a ministerial officer.

We have no disposition to question the validity or strength of the reasoning in these cases, theoretically considered. It is sufficient to say that with nearly seventy years experience under our constitution, it is believed that the evils apprehended have not existed to any considerable extent. Indeed it is believed that if the Massachusetts rule prevailed here, the evils that would arise from increased litigation, subjecting men who, it must be presumed, endeavor honestly and fairly to discharge their official duties, to annoyance and expense, would be greater than any we have hitherto experienced. Viewed in the light of experi-

ence we cannot regard those reasons as sufficient to induce us to depart from the general rule.

For two thirds of a century our system has been in operation, and we are not aware that the records of our courts show any cases of this description. This circumstance, though not in itself a decisive argument, tends strongly to show the almost universal sense of the profession during that time that such an action cannot be maintained.

As a rule, we think the duties devolving upon boards of registration are fairly and honestly discharged. Doubtless it occasionally happens that a man entitled to vote is excluded, or one not entitled to vote is admitted; but so far as such cases result from mistakes it is hard to subject the members of the board to an action.

We think it not politic or wise to expose those upon whom the law casts the burden of ascertaining the qualifications of electors to the annoyance of private suits for errors in judgment. If they act wantonly or maliciously, there may be a private remedy; but that is not this case, as there is no allegation of wanton or malicious conduct.

We think that the general rule which exempts judicial officers from liability should continue to apply to boards of registration so long as they act in good faith and within their jurisdiction.

The Superior Court is advised that the complaint is insufficient.

In this opinion the other judges concurred.

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58	297
53	536
63	49

THE STATE *vs.* DAVID BEAUDET.

Upon a trial for an assault on *A* with intent to murder, in which the defense was that *B* and not the prisoner made the assault, evidence of threats of *B* against *A* was held inadmissible.

[Argued December 2d, 1885—decided March 26th, 1886.]

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INFORMATION for an assault with intent to murder; in the Superior Court. Tried to the jury before *Stoddard, J.* Verdict guilty, and appeal by defendant on the ground of error in the rulings and charge of the court. The case is sufficiently stated in the opinion.

E. Zacher, with whom was *S. W. F. Andrews*, for the appellant.

T. E. Doolittle, State's Attorney, for the State.

LOOMIS, J. The prisoner was tried upon an information for an assault upon one Dr. Walter Zink with intent to murder. He was at the time in Dr. Zink's employ and an inmate of the family, the other members being the wife of Zink, who was very deaf, a daughter aged fifteen, and a little son much younger. The state claimed to have proved that the prisoner was present in the room with Dr. Zink a short time before the commission of the offense and was found in the house shortly after. The assault took place in the dining room of the house a few minutes after eleven o'clock in the evening. Dr. Zink at the time had upon his person two rolls of bills, one of fifty-six and the other of two hundred dollars. During the day time preceding the assault he had received sixteen or eighteen dollars from one Robert Dougherty, who then had opportunity to see one of the rolls of bills.

On the south side of Zink's house, leading from the street to the barn, is a drive-way, and on the easterly side is a fence and gate leading from the drive-way to an orchard on the south. That part of the drive-way opposite the gate consists of soft and sandy soil. Very soon after the assault, and before any other persons arrived, the prisoner and Mrs. Zink passed out of the house and with bare feet went over the drive-way and through the gate into the orchard, the prisoner going a few feet ahead. At a place about fifteen feet beyond the gate Mrs. Zink discovered on the ground a roll of bills, consisting of two hundred dollars. She also

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picked up a watch beside the drive-way, and some bills in the dining room, and the prisoner also picked up some silver money there. They both returned into the house and made no further search. Early the next morning the impression of bare feet of human beings was noticed in the sand of the drive-way leading to and from the gate into the orchard. They were examined by the coroner of the county and by others, and at the coroner's suggestion Dougherty and the prisoner made impressions on the sand with their bare feet, which were measured and compared with those on the drive-way. The latter indicated that the second toe was somewhat longer than the first. The experimental impressions made by Dougherty were nearly the same as those found on the drive-way, while those made by the prisoner were a quarter of an inch less in length and a little less in width, but no other difference was mentioned. At about ten o'clock on the evening of the assault Dougherty was in the Linsley House, situated from twelve to fifteen hundred feet distant, and remained there until half past ten, when he left, and was last seen near there on the railroad track very drunk, staggering, and on the road to his house. In addition to the other circumstances the state relied upon the confession of his guilt by the accused, as shown by the testimony of two witnesses.

Upon the trial a witness was asked "whether Dougherty upon that night in that saloon, between the hours of half past nine and half past ten, made any threats against Dr. Zink?" and another witness was asked "whether on the day before the assault, Dougherty in his hearing made any threats against Dr. Zink?" Both questions were excluded by the court and exception taken by the defendant's counsel; and this ruling presents the only question for review.

At the outset it should be noticed that the offer was simply to prove the threats of Dougherty against Dr. Zink. Any threats of any kind would have filled the offer. What act Dougherty threatened to do, or when or how he was to do it, was not indicated; nor was the offered evidence accompanied with any claim, or even a hint, that it could or would

be supplemented by further testimony. Indeed, it no where appears in the record that it was even claimed in behalf of the prisoner that Dougherty committed the offense or that any evidence admitted or to be offered would show it. The threats, whatever they were, so far as appears were entirely isolated from the transaction in question, and tended in no way to elucidate or give character to any material act or fact in the case. They could not therefore have been received as parts of the *res gestæ*. As to the threats in the saloon, the only thing it would seem which they characterized was the drunken condition of the one who uttered them.

We will first consider whether the exclusion of this evidence injuriously affected the accused. If it could not properly have changed the result, then he was not aggrieved by the ruling. In this part of the discussion we assume, as the record justifies us in assuming, that no further evidence affecting Dougherty was to be offered. If then we supply the additional fact of threats made, and assume, for the benefit of the accused, beyond what the record states, that they were threats of personal violence, could they by any possibility have shown Dougherty guilty of the attempted murder, so as to relieve the accused? Would the offered evidence have rendered any of the circumstances relied upon by the state inconsistent with the guilt of the accused or consistent with his innocence? Would it have accounted for the money found in the very path the accused took that night, soon after the offense was committed, and immediately after it was discovered, as the state claimed, that Dr. Zink had recovered his consciousness? Could it possibly have tended to show that the accused had no peculiar motive hastily to rid himself of the fruits of the crime which Dougherty might not also have had? It does not seem to us possible that the proposed evidence could have impaired in the least the circumstantial evidence against the accused; and surely no one would claim that it could affect the evidence derived from the confessions of the prisoner. In regard to the evidence furnished by the coroner's experi-

ment with the tracks, it may not be amiss to remark that its only possible bearing would be to furnish presumptive evidence that Dougherty and not the accused went there that night soon after the offense was committed, but there seems to have been direct evidence to show that the accused went over the drive-way in his bare feet, as did Mrs. Zink also, and it is pretty certain that they made impressions on the soft and yielding sand opposite the gate; and the difference in size which the measurements indicated could be readily explained by the fact that in one case the impressions were made while standing still and in the other when moving rapidly forward.

But the counsel for the accused in substance claimed before this court that the state relied upon opportunity to commit the crime in the absence of any motive attributed to the accused, and that the excluded evidence would have shown both motive and opportunity in another, and therefore if received would have weakened the case for the state. Waiving any criticism on this imperfect statement of the claims of the state, we suggest that the threats had no bearing at all upon the question of opportunity. The opportunity of the accused, though obviously better than that of any one else save Mrs. Zink, was far from being exclusive. It was quite possible for Dougherty or others to be there. Now as to the motive relied upon by the state, it was not hatred or revenge, but love of money. We should not expect a person impelled by such a motive to utter threats at all; he would go stealthily to assail his victim. In this point of view the threats uttered by Dougherty, if they might otherwise have indicated ill will on his part, could not have affected the motive that moved the accused or have weakened the evidence relied upon to connect him with the crime.

But we will forbear further discussion of this aspect of the case, as it is not necessary to place our refusal to grant a new trial on this ground, and proceed to consider the precise question raised by the appeal, namely, were the threats of Dougherty admissible at all under the circumstances

stated? and if so, upon what principle? The only plausible ground for the admission is, that as the accused might exculpate himself by showing that another was the guilty party, so any item of evidence which would have been admissible had such other person been on trial, should be received in his favor. We concede the premises, but not the conclusion; for under the rules of evidence it makes a vast difference whether declarations offered in evidence come from the party on trial or not. In the one case they are universally admitted, unless irrelevant or self-serving. In the other they are by general rule excluded, subject to a few well marked exceptions. In 2 Best on Evidence, § 506, under the head of "*Res inter alios acta*," it is said:—"No person is to be affected by the words or acts of others, unless he is connected with them either personally or by those whom he represents or by whom he is represented." Were this a civil suit in favor of Dr. Zink against the same defendant for the same assault, would it occur to any one to offer the declarations of Dougherty that he intended to do the act, or even that he had done it? Is it any the less a matter *inter alios* when the state is a party? In either case it would be a legitimate defense that another person had committed the deed, but in neither would his threats alone be admissible.

Now to illustrate some of the reasons for such distinction we will add, that where the threats of the one on trial are adduced against him he is always present in court to deny or qualify them, to show that the witness misunderstood, misremembered or was false, or to explain how the threats were uttered in a transient fit of anger or from mere bravado or for intimidation; but where the threat of a third person is introduced he may be far away, and no one can explain its real meaning; and besides, the very introduction of such a collateral issue serves greatly to confuse and mislead the triers, and justice may thereby be defeated. And if the jury were to pass on the collateral issue, it would have no other effect than to acquit the one on trial; the third person could be in no wise legally affected. If he

should afterwards be indicted, and put on trial for the same offense, he would still be at full liberty to show his innocence, notwithstanding the fact that the former finding of his guilt caused another's acquittal. And so if he had previously been tried and acquitted, that fact could in no wise affect the admissibility of his declarations when afterwards another person is on trial for the same offense, for the latter would be no party to the verdict. It is therefore going far enough in favor of the accused to allow him to exculpate himself by showing the fact of another's guilt by some appropriate evidence directly connecting that person with the *corpus delicti*. The animus of a third person is no defense, and by itself it cannot prove the ultimate fact which is a defense. Even as to the threats of the person on trial, Wharton, in his Criminal Evidence, 8th ed., § 756, says they "are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not, but because from them, in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be logically inferred." Then follows a list of infirmative suppositions, designed to show that because one threatens to commit a crime it does not follow that such intention really existed in his mind, much less does it show the actual commission of the crime. Nearly all treatises on evidence contain similar cautions. In 3d Bentham's Judicial Evidence, 75, it is said that "declarations of an intention to commit a crime are no less susceptible of being false than declarations of the opposite cast, namely, declarations of an intention to abstain from the commission of that or a similar crime."

We insist therefore that it is reasonable to exclude the mere disconnected threats and declarations of third persons. If they are parts of the *res gestæ*, or form links in a chain of evidence connecting with the crime itself, they may doubtless be received. If the threats were to commit a crime in a particular mode, and it was in fact so committed, perhaps they would then be admissible. But in the case under consideration there is nothing at all to show that the thing threatened had any sort of resemblance to the thing done either in kind or mode.

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But if we suspend our discussion of the principles which ought to be applied to the question and pass to the consideration of the decided cases as found in other jurisdictions, we shall find the ruling of the court vindicated not simply by the preponderance of judicial authority but by absolute unanimity, save in one case in Louisiana, which for reasons to be suggested hereafter can have little weight in the opposing scale.

We will first cite cases precisely analogous to the case at bar in that threats of third persons prior to the commission of the crime were offered in evidence by the accused and excluded; but the threats, instead of being vague and indefinite, as in the case at bar, were generally very specific and significant.

The case of *State v. Davis*, 77 N. Car., 483, was an indictment for murder. On the trial the prisoner proposed to prove by one Peck "that George Nicks had malice toward the deceased and had a motive to take his life, and opportunity to do so, and had threatened to do so before the court." He further offered to prove by one Rice "that one Peck took a gun and went in the direction of the house of the deceased sometime before the deceased was killed." The court says: "Both exceptions are untenable and have been repeatedly so held by this court; the first, because they are declarations of a third party and are *res inter alios acta* and have no legal tendency to establish the innocence of the prisoner, and the second for the same and the additional reason that the time is too vaguely and indefinitely set forth. * * * Such evidence is inadmissible because it does not tend to establish the *corpus delicti*. Unquestionably it would have been competent to prove that a third party killed the deceased, and not the prisoner. But this could only have been done by proof connecting Peck with the *fact*, that is, with the perpetration of some deed entering into the crime itself. Direct evidence connecting Peck with the *corpus delicti* would have been admissible. After proof of the *res gestæ* constituting Peck's alleged guilt had been given, it might be that the evidence which was offered

and excluded in this case would have been competent in confirmation of the direct testimony connecting him with the fact of killing. No such direct testimony was offered here. It is unnecessary to elaborate, as the questions of evidence here made have been fully discussed and decided by this court in many cases. It is only necessary to refer to the principal ones. *State v. Bishop*, 73 N. Car., 44; *State v. May*, 4 Dev., 328; *State v. Duncan*, 6 Ired., 236; *State v. White*, 68 N. Car., 158."

These cases are all pertinent and supported by similar and some additional reasons. We will not take the time and space necessary for a particular statement of the evidence offered and the reasoning of the court sustaining its exclusion. To the above list we will add the case of *State v. Haynes*, 71 N. Car., 79.

In *Crookham v. The State*, 5 W. Vir., 510, it was held that it was no error to exclude testimony offered by the prisoner to the effect that another and a different person from himself had made threats to kill the deceased, just before the commission of the offense with which he was charged, and that immediately after the offense such other person left the country and has not since been heard from.

In *Boothe v. The State*, 4 Texas Ct. of App., 202, and in *Walker v. The State*, 6 id., 576, both being indictments for murder, it was held not competent for the accused to prove that a very short time before the homicide a person other than the accused made threats to take the life of the deceased. In the last case the court supported the ruling by saying:—"The issue of the trial was the guilt or innocence of the defendant on trial. Evidence is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; and this seems to be the limit, and excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and for the good reason stated for the rule by Mr. Greenleaf, that such evidence tends to draw away the minds of the jury from the point in issue and to excite prejudice and mislead them. 1 Greenl. Ev., secs. 51, 52."

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We may add that the doctrine of these cases has received the recent approval of jurists and text writers of high authority. Wharton, in his treatise on Criminal Evidence, § 225, says that "evidence of threats by other persons is inadmissible." The same doctrine is found in Wharton on Homicide, § 693. In 2 Bishop on Criminal Procedure, § 623, it is said:—"The declarations of the deceased, as of any third person, when not of the *res gestæ*, or dying declarations, or communicated to the defendant so as possibly to influence his conduct, are excluded by rules which have been supposed to promote justice on the whole; at all events, which have become parts of the common law, not within the discretion of the courts to set aside. Hence they are not admissible." And again, in the first volume of the same treatise, § 1248, it is said:—"In general what one says, as for example, that he committed the crime in question, will not be admitted for or against another."

In further support of the ruling complained of we adduce a few of the numerous decisions holding that admissions of third persons, that they and not the accused are guilty of the crime charged, are to be excluded.

In the early case of *Commonwealth v. Chabcock*, 1 Mass., 143, the prisoner was tried on an indictment for breaking into a house, and also for stealing goods therein. The defendant offered to prove by a witness present that another person had owned to the witness that he had stolen some of the articles mentioned in the indictment. The court held that the evidence could not be admitted, saying:—"It was no more than hearsay. If a person other than the defendant had stolen the goods it was undoubtedly competent to the defendant to prove the fact in exculpation of himself, but not by the mode of proof now offered."

In *Smith v. The State*, 9 Ala., 990, the prisoner (a slave) was indicted for the murder of one Edmund (also a slave). All the evidence was circumstantial. Sam, another slave, had been tried and acquitted for the same murder previously. On the trial it seems there was a strong array of circumstantial evidence against him, but Sam stated that a

few days after the murder Smith told him that he killed Edmund. The particulars of the statement we omit. But on the trial of Smith evidence was offered in his behalf that Sam during his own trial had become alarmed and had told the witness that he had wrongfully accused Smith of the murder of Edmund and he did not wish to die with a lie in his mouth. The counsel for the accused claimed that it was competent for the prisoner under the circumstances to show that another committed the murder, and that in this view the declarations of Sam should have been received, as they tended to inculcate him as well as to show that the prisoner was not the offender. ORMOND, J., in delivering the opinion of the court, said:—"Conceding the true meaning of these declarations of Sam in jail to be an admission of his own guilt and that he had killed Edmund himself, it does not vary the case in the slightest degree. * * * The declaration of Sam was not an act within the meaning of the doctrine I have been discussing. * * * To give effect to the mere declarations of third persons would be a most alarming innovation upon the criminal law. Such a declaration would not be obligatory on the person making it. He might afterwards demonstrate its falsity when attempted to be used against him. Such testimony may be a mere contrivance to procure the acquittal of the accused."

In *West v. The State*, 76 Ala., 98, the question was again before the highest court of the same state, and it was held "that the admission of a third person that he committed the offense with which the accused was charged, not made under oath, though on his death bed, is mere hearsay, and is not admissible as evidence for the accused."

In *Sharp v. The State*, 6 Texas Ct. of App., 650, it was held no error to refuse to allow a witness for the defense to testify that certain other men confessed that they committed the crime. A similar ruling was also sustained in *Rhea v. The State*, 10 Yerg., (Tenn.,) 258.

Greenfield v. The People, 85 N. York, 75, was an indictment for murder. Upon the trial the accused offered the letter of one Royal Kellogg to his brother, in which, after

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alluding to the murder, he said among other things, "If they want me they can come and get me," and in connection with the above and with certain anonymous letters containing confessions, they offered the declarations of Kellogg and his brother and another person, made within an hour after the murder and at a place three fourths of a mile distant. The witness being awakened by the barking of a dog at about four o'clock in the morning, on looking out the window recognized the two Kelloggs and one Taplin, and they had a gun and a bag, &c. The witness, after giving in detail their suspicious actions at this place, was offered to prove that Taplin said to the Kelloggs on that occasion before they left—"You were damned fools to do it," and that one of the Kelloggs replied—"If we had not done it we should all have been hung." MILLER, J., in delivering the opinion of the court said:—"Even if this letter could be regarded as a confession of Kellogg that he committed the murder, it was only the declaration of a third party, merely hearsay testimony, and upon no rule of evidence admissible. If such declarations were competent upon any trial for homicide they would tend to confuse the jury and to divert their attention from the real issue. The letter did not tend to establish that Kellogg committed the offense, was not a part of the *res gestæ*, and in no sense relieved the prisoner from the charge for which he was upon trial, or raised any presumption that Kellogg was the guilty party. Confessions of this character are sometimes made to screen offenders, and no rule is better established than that extra-judicial statements of third persons are inadmissible. Wharton on Evidence, § 644; Wharton's Crim. Law, §§ 662, 684; 2 Best on Evidence, §§ 559, 560, 563, 565, 578. * * * While evidence tending to show that another party might have committed the crime would be admissible, before such testimony could be received there must be such proof of connection with it, such a train of facts and circumstances, as tend clearly to point out some one besides the prisoner as the guilty party. Remote acts disconnected and outside the crime itself cannot be sepa-

rately proved for such a purpose. In considering the question we have carefully examined the numerous authorities cited to sustain the position that the evidence was competent, and none of them hold that under such circumstances it could lawfully be received, and it was neither admissible alone nor in connection with the letters referred to."

In Wharton's Criminal Evidence, § 225, it is said:—"Extra-judicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestæ*, or made by deceased persons in the course of business, or as admissions against their own interest, or are material for the purpose of determining the state of the mind of a party who cannot be examined in court. * * * Hence, on an indictment for murder the admissions of other persons that they killed the deceased or committed the crime in controversy, are not evidence; and evidence of threats by other persons are inadmissible. * * * On an indictment for larceny also, declarations of third parties that they committed the theft are inadmissible."

In all the numerous cases we have examined where threats of third persons were excluded, there was no dissenting opinion in any instance, and after most diligent search we have been able to find but one case which furnishes any support to the claim of the accused. We refer to that of *State v. Johnson*, 30 Louisiana, 921, where the state, in a prosecution for murder based entirely on circumstantial evidence, found it necessary to trace to the accused a motive for the homicide in a previous quarrel with the deceased, when the accused while in liquor uttered threats against the deceased, and upon cross-examination the witness for the state, who had in chief testified to the quarrelsome character of the deceased and to the threats of the accused, was asked "what other quarrels the deceased had besides that with the accused, a few days prior to the murder;" and the trial court excluded it. The court of review cites no authorities and enters into no discussion of the question upon principle, but simply says in effect that although it was of doubtful admissibility, yet on the whole they will give the accused the benefit of a new trial.

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But even this case can be widely distinguished from the one on trial. The state had put in issue the quarrelsome character of the deceased, and to that extent the cross-examination was pertinent, and further, the case seemed to be controlled by the question whether the motive arising out of a recent quarrel pointed exclusively to the accused; the fact drawn out on cross-examination might show that it did not, and therefore there was some force in the claim that it was admissible in order to weaken that evidence by showing that others were also included and shared the same motive. But in the case at bar we have already called attention to the fact that the motive which moved Beaudet was entirely different from that attributed to Dougherty, and hence the evidence as to the latter in no way impaired that applicable to the former.

In regard to the admissibility of the confessions of guilt by third parties in criminal trials, there is absolute unanimity in the decisions so far as we have been able to ascertain. In *Smith v. The State*, (supra,) GOLDTHWAITE, J., dissents from the majority opinion, but in so doing he expressly concedes "that the confession of a third person of his guilt is not evidence in favor of another, when standing alone, unaided by other facts and circumstances"; yet he contends that "it is so whenever the party confessing is connected with the crime by strong presumptive circumstances." We find also a qualification of the doctrine in the dictum of a distinguished reporter. It is found in a note to the case of *Speare v. Coate*, 3 McCord, (S. Car.,) side page 232, where the reporter gives a summary of the exceptions to the rule excluding hearsay evidence, and in paragraph twelve says:—"So confessions *in extremis* that the person himself had committed a forgery of which another was indicted is admissible," citing as authority *Clymer v. Littler*, 1 W. Black. R., 345. The reporter then adds his own opinion:—"So I should think that where a person comes forward, and confesses the crime, and surrenders himself to justice, such confessions would be admissible evidence for a prisoner accused of the same offense." It should

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be observed that stress is placed on the fact that the person confessing also surrenders himself to justice, implying that the confession alone would be insufficient, but we ought also to add that the principle of the case cited from 1 W. Black., 345, which led to and suggested the proposition just referred to, owing to some oversight or mistake was stated in an erroneous and most misleading manner. It would be supposed upon reading the note of the case that upon the trial of one person indicted for the crime of forgery the confessions *in extremis* of another person were held admissible in defense of the person on trial. But it was no such case. On the contrary it was a mere civil action based upon a controversy between adverse claimants to property under two different wills of one Clymer, deceased. The action was ejectment. The plaintiff claimed under a will made in 1743. The defendant claimed under the heir at law by an instrument dated in 1745, very imperfect in form, but purporting to have been subscribed by Mr. Clymer, and to give the property as follows:—"Whereby, in consideration of natural affection, he covenants and agrees" (but with nobody) "that the" lands in question "shall go and be given to his wife for life, and then to Elizabeth, wife of William Medlycott," (she being also his heir at law,) "and her heirs forever." It was attested by the said William Medlycott and Elizabeth Mitchell. The first will was concealed, and William Medlycott took possession under the last one in right of his wife, but on his death-bed in 1746 he declared that the instrument of 1745 was forged by himself, and he produced from under the bed-clothes the first will of 1743, and caused it to be sent to the parties interested, who had it proved, and who then brought this suit, and this evidence without any objection went before the jury in connection with the inspection of the two wills, and a verdict was rendered for the plaintiff. Lord MANSFIELD, in giving the opinion of the court on this point, simply says:—"The testator died in 1746. Both wills in the custody of Medlycott. The other subscribing witness dead. His wife to be benefited under it. He, on his death-bed, sends the lessor of

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the plaintiff his title, which is inconsistent with that under which the defendant claims. Under all these circumstances I think it admissible evidence. No general rule can be drawn from it. No objection was made to its production. It came out, it seems, on the cross-examination of the defendant's counsel. Unless therefore manifest injustice had been done on the whole case there is no ground for a new trial. There appears to be good reason for the verdict."

A further criticism of the proposition referred to may be found in 2 Phillips on Evidence, (4th Am., from 7th London edition, Cowen and Hill's notes,) p. 703, note 493:—"And if an actual surrender should make the declaration admissible, it would at once throw open the door for fraudulent testimony, even in exculpation of the most atrocious criminals. The self-accuser is yet to be tried, and he may act under the full consciousness of having such clear proofs of his own innocence, an alibi, or some other evidence, that he would be risking but little by doing the whole as an act of solemn trickery in behalf of his friend. The surrender would not estop him. Even should the people prosecute, convict and execute him as the sole malefactor, the verdict would not estop them nor be any evidence whatever against the first accusation. It would be *res inter alios*."

There was no error in the ruling complained of.

In this opinion the other judges concurred.

THE EVERGREEN CEMETERY ASSOCIATION OF NEW HAVEN
 vs. HENRY BEECHER AND OTHERS.

A cemetery association instituted a proceeding under the statute for enlarging its territory by taking adjoining lands owned in severalty by different persons. Held that all the owners, though having no joint interest, were properly made defendants together.

The burial of the dead being a necessity, land may be taken for the purpose under the authority of the state.

And land taken for such a purpose by a corporation authorized to establish and conduct a cemetery, is taken for public use, if all the public

53	551
58	94
53	551
52	321
53	551
77	87
77	430

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have a right of burial there, even though the expense may operate practically to exclude some.

But a corporation does not take land for a public use where the public have not, and can not acquire, the right to bury in it.

[Argued December 2d, 1885—decided February 19th, 1886.]

ACTION by the plaintiff, a cemetery association organized under the laws of the state, for the purpose of taking lands for the enlargement of its territory, under the provision of Gen. Statutes, p. 293, sec. 4; brought to the Superior Court. The defendants demurred to the complaint, and the case was reserved for the advice of this court. The case is sufficiently stated in the opinion.

J. W. Alling and J. H. Webb, for the plaintiff.

S. E. Baldwin and J. H. Whiting, for the defendants.

PARDEE, J. This is a complaint asking leave to take land for cemetery purposes by right of eminent domain. The case has been reserved for our advice.

The plaintiff is the owner of a cemetery, and desires to enlarge it by taking several adjoining pieces of land, each owned by a different person, and has made these owners joint defendants. Because of this joinder they demur. But we think that it is in harmony with our practice in analogous proceedings and with the spirit of the Practice Act, and that it promotes speedy, complete, and inexpensive justice, without placing any obstruction in the way of any defendant in protecting his rights. Each carries his own burden only; he is not made to carry that of any of his associates. Therefore the complaint, so far forth as this objection is concerned, is sufficient.

The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demands. In order to secure for burial places dur-

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ing a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing, maintaining and protecting them. The use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless it remains a public use as long as all persons have the same measure of right for the same measure of money.

But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and can not acquire, the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain. The complaint alleges that the plaintiff is an association duly organized under the laws of this state for the purpose of establishing a burying ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion.

Therefore the Superior Court is advised that for the reason that the complaint does not set out any right in the plaintiffs to acquire title to the land of the defendants otherwise than by their voluntary deed, the demurrer must be sustained.

In this opinion the other judges concurred.

Hall v. Armstrong.

EDWARD E. HALL AND ANOTHER *vs.* PHILANDO
ARMSTRONG.

The plaintiffs, while carrying on the grocery business in a store leased by them, took from the defendant a deed of a right of way from the street to the rear of the store, which contained the following limitation:—"To hold said right of way so long as they shall occupy said building for the grocery business now carried on by them." They afterwards failed and a corporation was formed to carry on the business, which purchased the stock of goods and the lease and employed the plaintiffs to assist in conducting the business, one of them being made chief manager. The plaintiffs were not stockholders of the company, and were not carrying on the business on their own account under cover of the corporation. Held that the right of way ceased when the plaintiffs ceased to carry on the business as owners of it.

[Argued December 3d, 1885—decided January 4th, 1886.]

ACTION for an injunction to prevent the obstruction of a way; brought to the Court of Common Pleas. Facts found and case reserved for advice. The facts are fully stated in the opinion.

T. E. Doolittle and *W. L. Bennett*, for the plaintiffs.

J. W. Alling and *G. R. Cooley*, for the defendant.

LOOMIS, J. On the 21st of November, 1883, while the plaintiffs as partners were carrying on the grocery business at a store leased by them fronting on Chapel street in New Haven, they obtained from the defendant the grant of a right of way over his land from Orange street to the rear of their store. The deed, after describing and locating the way, contained this limitation:—"To have and to hold the said right of way unto them the said Edward E. Hall and Edward E. Hall, Jr., and the survivor of them, so long as they or either of them shall occupy said building on Chapel street, belonging to Olivia H. English, for the grocery business now carried on by them."

On the 2d of February, 1885, the plaintiffs failed in busi-

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ness and made assignments of all their property in insolvency for the benefit of their creditors, and the trustee took possession of all the goods and fixtures in their store. Thereupon certain persons, from motives of friendship for the plaintiffs, formed a joint stock corporation under the corporate name of "The Edward E. Hall & Son Company," with a paid up capital of fifteen thousand dollars. The purpose, as expressed in the articles, was to carry on in New Haven a general grocery business, both at wholesale and retail. No mention was made of the store where the business was to be carried on, nor that the object was to employ or benefit the plaintiffs in any way. But it was found (subject to objection as to its admissibility) that there was an oral understanding that after the payment of six per cent. dividends to the stockholders, if earned, the balance of the net profits should belong to the plaintiffs as compensation for their services in the management of the business at the store.

The corporation was legally and honestly organized, and was not intended to cover property of the plaintiffs. The corporation purchased of the trustee all the goods and fixtures, and took possession of the store on the 14th of February, 1885, and has ever since carried on the grocery business in the store, and the plaintiffs from the time of their failure have ceased to carry on the business as owners. The plaintiffs are not officers, directors or stockholders of the corporation, but assist in carrying on the business, and one of them is general manager.

Upon these facts the contention of the defendant is that the right of way granted by him no longer exists, because the grantees and each of them have ceased to occupy the store referred to for the grocery business which they carried on when the grant was made; and therefore he obstructed the way and did the acts in relation to it for which the complaint was brought.

From the nature and limitations of the grant it is very clear that when each of the plaintiffs cease to occupy the store for the grocery business the right of way also ceases.

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It is not a way appurtenant, which is incident to an estate in land, inheres in it, and goes by transfer with it as a thing essential to its enjoyment; but it is what is called a right of way in gross, which is personal to the grantee, and, being so, it cannot be made assignable or inheritable even by words in the deed to that effect. 6 Wait's Actions and Defenses, p. 348; *Boatman v. Lasley*, 23 Ohio St., 614; Washburn on Easements, 8d ed., p. 10, § 11. It is also laid down by high authority that such a right of way is so exclusively personal that the owner of the right cannot even take another person into partnership with him. 3 Kent's Comm., 9th ed., side p. 420.

But the exigencies of this case do not require us to resort to the technical distinctions of the law as to ways. The parties expressed their meaning so clearly that any person of ordinary intelligence, though an utter stranger to legal distinctions, could not fail to understand that the duration of the way is limited to the personal occupation of the plaintiffs or one of them for the grocery business. The plaintiffs evidently so understood it, for when they brought this suit they distinctly alleged in the complaint an actual occupation by them as the foundation of their alleged right. The pivotal fact of the case therefore is the single question of continued occupation by the plaintiffs. It seems to us that this question has been settled as matter of fact against the plaintiffs by the positive finding of the trial court, that "on February 14th, 1885, said trustee, then in possession of said stock of goods and store fixtures in said store, sold the same to a joint stock corporation located in said New Haven and duly organized according to law, and known as The Edward E. Hall & Son Company. Said corporation thereupon took possession of said stock of goods, fixtures, store and business, and at once commenced to carry on a grocery business in said building, and have ever since continued so to do. * * * No grocery business but that of said corporation is carried on in said building."

But were we called upon to review this finding as to the occupancy in the light of other special facts found, we should be unable to reach a different result.

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It was urged in argument that there has been no apparent change as to occupancy, because the plaintiffs in person are present in the store and wait on the customers as before. But under the grant the question is not one of apparent but of actual occupancy. It is a matter that does not concern the public, but affects only the immediate parties, and it is to be determined by words of limitation which the parties themselves adopted. It is obvious that the terms of the grant cannot be satisfied with the mere bodily presence of the plaintiff, nor with the fact that they handle the goods and wait on the customers. The thing which the parties contemplated was the controlling mind of the plaintiffs, who were to direct the manner and extent of the business. They were to be there not as mere servants but as masters. It is impossible to make the corporation identical with the plaintiffs, without assuming that the scheme was a fraud; but this is distinctly negatived. The corporation is not in possession for one purpose and the plaintiffs for another. The former alone is master, and may direct the business in every respect, and may at any time dismiss the plaintiffs as its hired servants.

But it is further claimed that the plaintiffs are tenants of the store and therefore in possession. It is found that after 1879 and until the plaintiffs' failure the latter had no written lease and the only verbal one was a tenancy from month to month. The only pretence of a lease after the failure is founded solely on a casual remark of the owner before the failure to one of the plaintiffs, in reply to a suggestion by him that they might have to go into insolvency, and that it was very uncertain about their being able to continue the business; and to some inquiry about the store the owner said "That is all right Ed., you can stay there as long as you choose." It is idle to make out a tenancy from this remark, especially in view of the further finding that "no special contract or agreement has been made since the formation of said corporation, between the owner of said building and the plaintiffs, or between said owner and said corporation, or between said Halls and said corpora-

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tion, in regard to leasing said building; but the rent for said building since the formation of said corporation has been paid to the owner in monthly installments, in part by groceries from the store of said corporation, and by checks of said corporation for the balance, payable to the order of the owner, and signed 'The Edw. E. Hall & Son Company, E. E. Hall, Jr., Supt.' No rent account has been kept in the books of said corporation with the said Halls or either of them, but the same has been entered in the general expense account of said corporation. * * * Upon the above facts the court finds that said corporation, when it took possession of said stock and fixtures, became the tenant of the owner of the building, unless the law upon all the facts herein contained is otherwise."

This court surely upon these facts cannot find the law to be otherwise.

For these reasons the Court of Common Pleas is advised to render judgment in favor of the defendant.

In this opinion the other judges concurred.

LIZZIE DOUGHERTY vs. JOHN WELCH.

The act of 1885 (Session Laws 1885, ch. 102,) provides that evidence objected to shall not be received subject to the objection, unless both parties consent. Held not to apply to evidence received provisionally, with reference to further evidence which counsel propose to supply.

[Argued December 3d, 1885—decided January 4th, 1886.]

ACTION for an injury from the bite of a dog; brought to the Court of Common Pleas, and tried to the court before *Studley, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is sufficiently stated in the opinion.

Dougherty v. Welch.

J. P. Pigott and W. S. Pardee, for the appellant.

J. W. Alling and S. C. Loomis, for the appellee.

PARDEE, J. This is a complaint for damages for injuries resulting from the bite of a dog. Upon the first day of the trial, for the purpose of proving that the defendant was the keeper of the dog, the plaintiff offered evidence tending to prove that subsequently to the injury the defendant's wife stated in his absence that the defendant and herself, having unsuccessfully tried to get some one to shoot the dog, had killed him by poison. To this evidence the defendant objected, because there had been no proof of agency on the part of the wife to speak for the defendant in his absence. The counsel for the plaintiff stated that he in good faith believed that he could present other testimony which would make this admissible. The court then admitted the testimony offered, subject to the objection. After the close of the first day the trial was postponed and not resumed for a period of about two months. Within about a week after the adjournment the court notified counsel on both sides that he had rejected the testimony offered; and the finding is that it was not considered by him in rendering judgment. The reasons of appeal, pressed by the defendant, are substantially that the court erred, first, in receiving, secondly, in rejecting the offered testimony. The statute provides as follows:—"Whenever evidence offered upon the trial of any civil action is objected to as inadmissible, the court or committee trying such action shall not admit such evidence subject to the objection unless both parties agree that it be so admitted; but if either party shall request a decision it shall be the duty of such court or committee to pass upon such objection and admit or reject the testimony." Session Laws of 1885, p. 463, ch. 102. The saving of time, the introduction of proof of events in the order of their occurrence, and the convenience of parties and witnesses, are oftentimes promoted by allowing the court to receive evidence as to the acts of a person who, it is claimed, was an

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agent, before proof of the agency is presented ; to receive it provisionally, conditionally only, upon assurance of counsel that he believes the agency can and will be proven ; to be heard merely, not considered. The exercise of discretion in this regard has long been the privilege of the court, and the cited statute does not deprive him of it. It would be impossible to conduct judicial investigations upon the theory that everything which reaches the ear of the trier affects his final determination of questions of fact beyond all power of resistance upon his part. There must be conceded to him the ability to bar his mind against influence from that which he hears either by accident or intention, if he knows it is not then evidence, and can only become so when properly supplemented. Under such circumstances it is not heard as present evidence ; it is not taken into the mind ; it is received rather as a folded writing to be opened and read when other evidence has made it proper to do so. There is a wide difference between this and the reception of evidence unconditionally, and the retention and consideration of it for days as pertinent and proper. After this it is not permitted to the trier to say that it has left no trace of its presence. No man can be quite certain that he is aware of all the influences which have produced conviction. It is one thing to prevent the entry of an influence into the mind ; quite another to dislodge it. This case therefore is to be distinguished from *Jacques v. Bridgeport Horse Railroad Company*, 41 Conn., 61.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

Alexander v. Church.

JOHN ALEXANDER vs. SARAH A. CHURCH.

The plaintiff alleged in his complaint that as a sub-contractor in the construction of a building for the defendant, he had an inchoate lien on the property for his claim and was about to take proceedings to perfect it, when the defendant, for the purpose of preventing his doing so, falsely represented to him that she had paid the original contractor in full and that nothing was due him; and that the plaintiff, believing the representation, did not perfect his lien, and thereby lost it; claiming damages for the false representation. Held, on a demurrer to the complaint that it presented a good cause of action.

And held not to affect the case that it did not appear that the original contractor was irresponsible, nor that a demand had been made on him for payment. The plaintiff was entitled to his lien as security without reference to his remedy against the original contractor.

[Argued December 4th, 1885—decided January 4th, 1886.]

ACTION for damages for false representations by which the plaintiff lost a lien upon the property of the defendant; brought to the Court of Common Pleas. The defendant demurred to the complaint; the demurrer was overruled, and the case tried to the court on a general denial before *Studley, J.* Facts found and judgment rendered for the plaintiff, and appeal by the defendant. The case is sufficiently stated in the opinion.

C. H. Fowler, with whom was *D. W. Tuttle*, for the appellant, cited 1 Hilliard on Torts, ch. 1, § 6, note *a*; *Otis v. Raymond*, 3 Conn., 413, 417; *Austin v. Barrows*, 41 id., 296; *Hemingway v. Coleman*, 49 id., 390; *Phelps v. Stearns*, 4 Gray, 105; *Dunlap v. Glidden*, 31 Maine, 435; *Grove v. Brandenburgh*, 7 Blackf., 234.

E. P. Arvine, for the appellee.

PARK, C. J. Very little need be said in this case to vindicate the judgment of the court below. The defendant demurred to the complaint in that court, but it was adjudged sufficient, and this action of the court is made the

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ground for the claim of error in this court. The principal allegations of the complaint are the following :—

1st. That the plaintiff had an inchoate mechanics' lien on the premises of the defendant for materials furnished and labor performed as a sub-contractor in the construction of a building on the premises.

2d. That the premises were amply sufficient in value to secure the plaintiff's claim.

3d. That the plaintiff had taken some of the steps provided by the statute towards the perfecting of his lien.

4th. That he was induced not to perfect the lien by the false and fraudulent declarations of the defendant that she had paid the contractor in full for the building and did not owe him anything on account of it, such payment having been in part by accepting orders drawn by him in favor of other parties, and in part by the payment of money, both of them before the plaintiff had given notice of his lien.

5th. That these declarations were made with the intent to deceive the plaintiff and induce him to forego the perfecting of his lien.

6th. That the representations had the desired effect in deceiving the plaintiff and in causing him to desist from the perfecting of his lien.

7th. That in consequence of these false and fraudulent representations the plaintiff lost his security upon the property, which he had in an inchoate condition when the representations were made, and lost the debt which was justly due him for labor performed and materials furnished in the construction of the building.

These are the principal allegations of the complaint, and they seem to us amply sufficient to constitute a cause of action against the defendant for the loss which the plaintiff had sustained by the failure to perfect his lien. Cooley (on Torts, p. 474.) says :—"Fraud consists in deception practised in order to induce another to part with property or surrender some legal right, and which accomplishes the end desired." According to this definition it is manifest that here are all the elements of actionable fraud. False repre-

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sentations were made by the defendant with the intention to deceive the plaintiff and thereby prevent his acquiring a lien upon her property, which was then but partially accomplished; and the representations had their intended effect. The defendant likens this case to that of *Austin v. Barrows*, 41 Conn., 287; but the distinction between the cases is obvious. In that case no action whatever had been taken to acquire a lien by attachment of the debtor's property, and there was nothing to indicate with any degree of certainty that an attachment would ever have been made if the acts of the debtor and others assisting him in concealing his property had not been done. Here the plaintiff's inchoate lien had attached to the defendant's property, and he was engaged in perfecting it, but was stopped in doing it by the false and fraudulent declarations of the defendant. In *Adams v. Page*, 7 Pick., 541, it was held that an action would lie for fraud in defeating an attachment by means of a collusive prior attachment. And clearly such would be the case if the same end was accomplished by fraudulent representations. See also *Marshall v. Buchanan*, 35 Cal., 264.

We think the complaint is sufficient, and the court below committed no error in so deciding. The remainder of the case requires but little comment. The court has found all the material allegations of the complaint true, except the one that the contractor for the construction of the building was irresponsible at the time that notice of the plaintiff's intent to claim a lien on the property was served upon the defendant, and continued to remain irresponsible. The court finds that no evidence was offered to show that the contractor was unable to pay the plaintiff's claim, or that any demand to pay it had been made upon him.

We think the finding of the court in this respect makes no material difference in the case. The plaintiff was entitled to his lien as security for his claim, however it may have been in regard to the ability of the contractor to pay it.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

Russell v. Cruttenden.

RUFUS G. RUSSELL vs. SAMUEL H. CRUTTENDEN.

On the trial of an action on the warranty of a horse, the plaintiff, who testified in his own behalf, was asked on cross-examination by the defendant's counsel how many other purchases of horses he had made in the last twenty years and tried to set aside on the ground that he had discovered defects in them. Held to be inadmissible, as raising an outside and irrelevant issue.

And held not admissible as going to show that the plaintiff was not an expert on the subject of the diseases and vices of horses.

Nor for the purpose of showing that the plaintiff was given to imagining that horses he had purchased had defects. This fact, if established, would not tend to show that the particular horse that was the subject of the present controversy was free from defects.

[Argued December 9th, 1885—decided January 4th, 1886.]

ACTION on a warranty of a horse; brought to the Court of Common Pleas, and tried to the court before *Pickett, J.* Facts found and judgment rendered for the plaintiff. Appeal by the defendant for error in the rulings of the court. The case is sufficiently stated in the opinion.

L. Harrison and *E. Zacker*, for the appellant.

T. E. Doolittle, for the appellee.

CARPENTER, J. This is an action on a warranty upon the sale of a horse. The complaint alleges that the horse was warranted sound, kind, and gentle, and that he was unsound, unkind, and restive. The Court of Common Pleas found that the horse was unkind, and rendered judgment for the plaintiff. The defendant appealed. On the cross-examination of the plaintiff the defendant's counsel asked the witness this question:—"How many other purchases of horses have you made within the last twenty years that you have revoked, or attempted to revoke, because you discovered defects in them?" Objection being made the court excluded it. The first reason of appeal is, that the court erred in so ruling.

It seems to us very clear that the ruling of the court was correct. The issue concerned the trade between the plaintiff and defendant alone. Other trades between the plaintiff and other parties, or what the plaintiff claimed under them, could throw no light on this transaction. Whether the plaintiff in other instances had complained, with or without reason, was immaterial. The question raised an outside and irrelevant issue.

The second and third reasons of appeal relate to the same ruling. It is claimed that the question was admissible, in connection with other matters, for the purpose of showing that the plaintiff was not an expert on the subject of diseases and vices of horses. We think no answer to the question would have had any tendency to prove that fact.

It is further claimed that it was admissible for the purpose of showing "that he had on several prior occasions, after purchasing horses, imagined that they had defects, and that it was an idiosyncrasy of his to imagine that horses had defects and to become alarmed about them after he had purchased them."

If the alleged defects in this horse were creatures of the plaintiff's imagination, the proper way to prove it would have been to offer direct proof as to the character and condition of the horse. Attempting to prove it indirectly by showing the habits of the plaintiff is objectionable. There is no necessary or probable connection between the plaintiff's habits in this respect and the vices and faults of this particular horse. Showing the existence of the former does not tend to prove the absence of the latter, and can be no answer to the plaintiff's evidence.

Two other questions were propounded to the same witness, which were rejected:—"Do you know what causes a spavin?"—"Do you know whether lameness precedes a spavin or not?" These rulings are complained of in the fourth and fifth reasons of appeal.

The issue, so far as it related to the unsoundness of the horse, was found for the defendant; so that the causes of a spavin, and whether lameness preceded it or not, were mat-

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ters of no consequence. Moreover the plaintiff testified that he did not claim to be an expert, and there was no evidence that he was ; therefore he could not properly answer the questions.

The sixth, seventh and eighth reasons of appeal, as the defendant's counsel say in their brief, "may be treated together, and are in substance an allegation that the court erred in finding, from the subordinate facts which appear upon the record, that there was a breach of the warranty that the horse was kind and gentle."

We must regard this as a question of fact. The court below found that the horse was not kind and gentle, and we see nothing in the statement of the case indicating that the finding is legally wrong.

There is no error.

In this opinion the other judges concurred.

WILLIAM H. ANDREWS AND OTHERS *vs.* RICHARD E.
RICE, TRUSTEE, AND OTHERS.

A testator whose sole heirs at law were two daughters, gave the greater portion of his estate to trustees, to pay over the entire income to them for their joint lives, and to the survivor half the income for her life, and out of the other half two hundred dollars to each of the children of the deceased daughter, the balance of the income to be added to the principal ; and on the death of the surviving daughter the whole property to be divided into as many shares as there should then be grandchildren of the testator, the children of a deceased grandchild to be counted as one and to take the parent's share per capita. Held—

1. That the gift to the grandchildren was to be regarded as a several bequest to each, and as not vesting in right until the time of the division of the property among them.
2. That the gift to the children of a deceased grandchild was void, as contravening the statute against perpetuities.
3. That the invalidity of that bequest invalidated the entire bequest to the grandchildren.

53	566
60	510
61	191
61	193
53	566
63	305
53	566
65	55
65	92
53	566
76	189
76	190
76	193

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4. That the direction to add the balance of the income to the principal during the life of the surviving daughter was not so connected with the bequest to the grandchildren as to be in itself invalid.

[Argued December 4th, 1885—decided May 3d, 1886.]

ACTION by the plaintiffs, as a part of the heirs at law of William Johnson, deceased, against the trustee under his will and the beneficiaries under the trust, for an adjudication as to the validity of certain provisions of the will; brought to the Superior Court. Facts found and case reserved for advice. The case is fully stated in the opinion.

S. E. Baldwin, for the plaintiffs.

1. The bequest to the grandchildren does not vest until the decease of the survivor of his two daughters. *Bristol v. Atwater*, 50 Conn., 404, 407; *Brown v. Williams*, 5 R. Isl., 309, 317; *Thomson v. Ludington*, 104 Mass., 198; *Hall v. Hall*, 123 id., 120, 124; *Everitt v. Everitt*, 29 N. York, 39; *Colton v. Fox*, 67 id., 348, 353; *Warner v. Durant*, 76 id., 133, 139; *Purdy v. Hoyt*, 92 id., 446, 454; *Hobson v. Hale*, 95 id., 588, 614; *Shipman v. Rollins*, 98 id., 311; *Colby v. Duncan*, 1 Eastern Reporter, 10.

2. The bequests to grandchildren, and especially to the children of deceased grandchildren, are void under our statute against perpetuities. *Allyn v. Mather*, 9 Conn., 114, 120, 127, 129, 132; *Rand v. Butler*, 48 id., 293, 299; *Alfred v. Marks*, 49 id., 476; *Wheeler v. Fellowes*, 52 id., 238, 244; *Turley v. Turley*, 11 Ohio St., 173; *Leffingwell v. Warren*, 2 Black, 603; *McArthur v. Scott*, 113 U. S. Reps., 383.

3. They are also void under our common law. *Rand v. Butler*, 48 Conn., 299; *Alfred v. Marks*, 49 id., 476; *Blagrove v. Hancock*, 16 Sim., 371, 376.

4. The invalidity of the provision for descendants who are not the immediate issue of grandchildren living when the testator died, invalidates the entire provision for the disposition of the principal of the fund. *Leake v. Robinson*, 2 Meriv., 363, 388; *Greenwood v. Roberts*, 15 Beav., 92, 98;

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Seaman v. Wood, 22 id., 591, 595; *Ker v. Lord Dungannon*, 1 Dru. & War., 509, 553; *Pearks v. Moseley*, L. R., 5 App. Cas., 714, 723, 733; *Fosdick v. Fosdick*, 6 Allen, 41, 48; *Sears v. Putnam*, 102 Mass., 9; *Amory v. Lord*, 5 Seld., 403; *Benedict v. Webb*, 98 N. York, 460, 466; *Lapham v. Martin*, 33 Ohio St., 99, 103.

J. T. Platt, for Mary E. Thayer, the surviving daughter of the testator.

1. It is contended by the plaintiffs that the provisions of the will relating to the disposition of the remainder of the estate, after the life estates of the daughters and of the survivor of them, are void as contravening the rule in regard to perpetuities. This rule and its application have recently been considered by this court in a series of cases of great importance, and we think it unnecessary for us, in view of that fact, to enter very deeply into a discussion of it. Unless it can be shown that the grandchildren took a vested interest from the decease of the testator, it is not perceived how, in view of the repeated rulings of this court, the ultimate disposition of the residue and remainder sought to be effected by the testator can be sustained. We agree with the plaintiffs' counsel in his contention that the testator intended that the shares should vest in the respective beneficiaries upon the decease of the surviving daughter. That this is the legal construction to be placed upon the language used, taken in connection with the several provisions relating to the ultimate disposition of the estate, also seems to us clear. At first sight there seems to be a resemblance between the case at bar and that of *Farnam v. Farnam*, just decided, but a closer study reveals the fact that there are wide differences. These differences are so essential that this case cannot be brought under the principle of *Farnam v. Farnam* without indulging in a latitude of exposition that would infringe old and well settled rules of law.

2. So far as the argument contained in the first three points of the brief filed by the plaintiffs' counsel is con-

cerned, we are at one with him. When we come to the question, what effect have the void provisions on the rest of the will, which he discusses under his fourth point, we are obliged to part company. If the provision of the testator's will for the ultimate disposition of the principal of his estate is invalid and falls, we concede that it is for the interest of the plaintiffs that the life estate of the surviving daughter, as provided for in the second and fourth paragraphs, should fall with it. That the testator had the capacity to create this life estate, and that he has done so, cannot be denied. It also seems to us clear that there is no necessary connection between this part of the will and the part supposed to be invalid, and that there is no legal reason why the life estate should not be sustained, as was done in the case of *Wheeler v. Fellowes*, 52 Conn., 238.

CARPENTER, J. William Johnson made his will in 1863. He died in 1874. In his will he gave the greater portion of his estate to trustees in fee simple, who were directed to pay over the income, after paying a certain annuity, in equal portions to his two daughters during their joint lives; and on the death of either to pay over one half the income to the other during life, and from the other half to pay to each of the children of the deceased daughter the sum of \$200 annually, the balance to be added to the principal. The fifth article of the trust clause of the will is as follows:—

“At the decease of my said surviving daughter said trustees shall divide the principal of said trust estate into as many equal shares as I may have grandchildren or their issue then living, the issue of any deceased grandchildren to be counted as one share; and I give and devise one of said equal shares to each of my said grandchildren in fee simple, and one of said shares to the said issue of each deceased grandchild who has left issue then surviving in fee simple, to be equally divided; and said trustees shall convey and pay over to each of said devisees one half of their said share when he or she becomes twenty-one years of age, and the other half when he or she becomes thirty years of age.”

If the gifts to the grandchildren and their issue do not vest until after the death of the surviving daughter, it is conceded that they are void by force of the statute against perpetuities. This is so because it was possible for grandchildren to be born after the death of the testator, and to die before the death of the surviving daughter leaving issue. So that the question is—whether these gifts vest, in point of right, in the grandchildren at the death of the testator, or when the property is divided into shares after the death of the surviving daughter.

We are constrained to say that they are contingent, and therefore do not vest during the lifetime of the daughters or either of them. There is no present gift to the grandchildren as a class, nor is there any gift to them jointly or as tenants in common; there is in fact no gift until there is a division of the property into shares, and there can be no division until the death of the surviving daughter. Until then the number of shares cannot be known. Upon the division there is a gift of one share to each grandchild and to the issue of each grandchild. There is not one gift of the whole property to all the legatees to be subsequently distributed, but there is first a division and then a gift of one share to each. Each grandchild takes his or her share in severalty, and the children of each deceased grandchild take one share as tenants in common. Until the division of the property therefore no one has any vested interest in any part of the property. His interest is contingent; if he dies without issue it is extinguished; if he leaves issue they take, not as his heirs, but as purchasers under the will.

From these considerations the logical conclusion is that prior to the division the grandchildren took a contingent and not a vested interest. Such was the manifest intention of the testator.

There is another provision in the will which is inconsistent with a vested interest; and that is the gift over to the charitable societies in case both daughters should die leaving no children or issue surviving them. The gift to each of the grandchildren is in express terms a fee simple. The

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testator clearly intended that whenever it did vest it should be an absolute, unqualified estate. If it vested on the death of the testator then there was nothing on which the sixth article of the will (to charitable purposes) could operate. The only escape from this conclusion is, that he intended to give the grandchild an interest vesting in right at his death, defeasible upon issue becoming extinct during the lifetime of his surviving daughter. For what purpose he should desire to give such a naked, unproductive right, or of what benefit it could be to the grandchild, it is impossible to conceive. We fail to discover any indication of such an intention. The better view is, that he intended that either the grandchildren or the charitable societies, as the case might be, should take after the death of the surviving daughter. One or the other must take, and not both successively.

These two features of this will distinguish this case from that of *Farnam v. Farnam*, 53 Conn., 261.

Our next inquiry is—how are these trusts, provided for in the will, affected by declaring the final disposition of the trust fund void? In answering that question we must ascertain the intention of the testator as to the object of those trusts, and whether that object is so independent of, and severable from, the illegal object, that it can be carried into effect with due regard to the legal rights of all the parties interested, without annulling any of the legal provisions of the will, and without adding thereto. If the leading and primary object was to accumulate a fund for illegal distribution; or if the trusts were strictly subservient or auxiliary to such a distribution so as to be themselves tainted with the illegality; or if they are so connected therewith that they cannot be separated and carried into effect without involving consequences substantially and materially different from what the testator intended, then they too must fall with the illegal distribution.

The will gives the residue of the testator's property to three trustees "as joint tenants in fee simple, in trust however and confidence for the following enumerated uses and purposes, namely":—

The first clause relating to the trust simply directs as to the management of the trust estate, and does not affect the question at issue.

"Second. Said trustees shall pay over to my said daughters, for their use, each one half of the net income and interest of said residue of my estate from time to time as the same shall accrue and be collected, deducting therefrom any amount I may in this instrument give and bequeath for other purposes."

The third clause directs the trustees to pay an annuity of \$600 to the sister of his late wife, and then continues as follows:—"And all the remainder of the net income of my estate the said executors or trustees shall pay over as it accrues to my two daughters, the said Julia Russell Andrews and the said Mary Elizabeth Thayer, to be equally divided between them, and to be for their sole and separate use respectively, and free from and independent of the control of any present or future husband of either; and the receipt of each of my said daughters shall discharge said trustees from any payment to her as fully as if she were unmarried.

"Fourth. At the decease of either of my said daughters said trustees shall pay to each of her children, if she leaves any surviving her, \$200 yearly for their education and support, not exceeding however in all the half of said remainder of said net income, during the life of my surviving daughter, and the other half of said remainder of said net income shall continue to be paid to my said surviving daughter during her life; any surplus income not paid over shall become part of the principal."

The fifth clause, after providing for a division of the trust estate into shares at the death of the surviving daughter, and giving one share to each grandchild, and one share to the issue of each deceased grandchild, to be paid one half on arriving at twenty-one years of age, and the other half on arriving at thirty years of age, proceeds as follows:—"And until so paid said trustees shall manage each share with the same powers hereinbefore given them, and shall pay over the income of each share from time to time to its

respective devisee, or for his or her support and benefit, as said trustees may judge best; provided however that the share of each grandchild and of their said issue shall be subject to the payment of the before mentioned annuity, &c."

Thus it will be seen that there are successive trusts; the first embraces the whole estate, and is for the benefit of the daughters during life; the second consists of several distinct independent trusts, each embracing one share only of the whole estate, and each being for the benefit of one grandchild or the issue of a deceased grandchild.

The trust for the daughters, and the several trusts for the grandchildren, evidently stand in different relations to the final disposition of the property and must be considered separately. The first is clearly severable from the illegal bequests. In creating it, manifestly, it was not the leading thought of the testator to accumulate a fund for the grandchildren. One object seems to have been to preserve the principal for them; but at the same time it seems to have been at least of equal importance in his mind to provide for his daughters during life. Consequently, as long as they both live the whole income is given to them. Had both lived to old age, as was possible apparently, and perhaps probable, when the will was made, and one had not long survived the other, the accumulation, if any, would have been slight. In view of such a possibility we cannot say that he intended or contemplated a substantial accumulation. In ascertaining the intention when the will was made regard must be had to the state of things as it then existed. The early death of one of the daughters was not anticipated, and of course was not specially provided for. It was an incidental circumstance that can have no proper bearing upon the construction of the will.

The fact that the testator provided that the income received by the daughters should be and remain their separate estate is of some significance in this connection. That was a legitimate purpose, and was in no wise connected with the illegal bequests. It was also a prominent feature of the trust. If now the trust is declared void then Mrs. Thayer

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receives her portion of the income as heir at law, and the separate character impressed upon it by the testator will be destroyed. Thus his intention to that extent will be defeated. We see no good reason why that should be done.

It was urged upon our consideration that the death of Mrs. Andrews during the lifetime of the testator results not only in an unequal disposition of the income during the life of the surviving daughter, but also increases the fund to be ultimately divided; and as that fund is now to be divided *per stirpes* instead of *per capita* as the will provides, the inequality contemplated by the will will be somewhat increased by giving the children of Mrs. Andrews one half of the property instead of three fifths. We have duly considered this circumstance and think that it ought not to invalidate the trust. So far as the income is concerned, the will as it stands, even if all valid, contemplates an inequality; consequently the testator intended it; especially is this so as Mrs. Andrews died in 1866, and the testator made three codicils after her death, making no change in the original will in this respect. That inequality does not seem to be affected at all by holding the bequests to the grandchildren and their issue void.

The final disposition of the principal fund will be, as suggested, somewhat different under the statute of distribution from the disposition contemplated by the will. We suppose that it always happens that when a will or part of a will is set aside and the property becomes intestate, the law disposes of it in a different manner. The law however produces no inequality; on the contrary its aim is equality,—not among the grandchildren *per capita*, but among the children. The execution of the trust involves an inequality in the disposition of the income. A portion of it, which Mrs. Andrews would have received had she lived, is carried to the principal, and the children of Mrs. Thayer as well as the children of Mrs. Andrews participate in it. One provision in the will partially remedies this inequality by giving Mrs. Andrews's three children three fifths of the estate and the two children of Mrs. Thayer two fifths of it. One

statute makes that provision void ; another statute divides the fund into two equal parts, one of which goes to the children of Mrs. Andrews and the other to the children of Mrs. Thayer. We do not find in this legal result a sufficient reason for declaring the trust void.

It is to be noticed that the incidental, and probably in the expectation of the testator very inconsiderable, accumulation of the property during the life of the surviving daughter, is only what the law itself would have required and effected in the absence of any direction in the will. If the testator had simply given one half the income to the surviving daughter for her life, and \$600 out of the other half to the three children of the deceased daughter, and had given no direction as to what should be done with the balance of the income, the trustees would necessarily add it to the principal. The law would keep no separate account of it. It is simply so much property, and as the whole property is held by trustees, it becomes a part of the trust fund and so far increases it. The direction in the will that this balance of income should be added to the principal cannot therefore be regarded as in contravention of the law. Nor can it borrow any infirmity from the invalidity of the second trust, as it cannot be regarded as an integral part of that scheme, and brought into being only on account of it, but as connected with it only in the most incidental manner. The testator has done with the balance of income only what he would have done if he had contemplated any other, even the most legal distribution of the final fund.

It is obvious that the balance of income could not be distributed from time to time to the heirs at law, (supposing the testator had given no direction to add it to the principal,) because the surviving daughter is to have half the income of all the property, and this becomes at once a part of the property. If therefore there had been no second trust, and no express direction as to adding the balance of income to the principal, the bequest to the surviving daughter is such as, by clear implication, to make the adding the balance of income necessary. It is clearly therefore no essen-

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tial part of the scheme of the second trust. It has a "reason for being" entirely of its own.

Whatever inequality may exist is the result of the law and the testator's clearly expressed intention, and is in no wise produced by holding the gifts to the grandchildren void.

We may add generally that the illegal bequest is not dependent on the trust; and the trust is not necessarily, nor in any legal sense, auxiliary to the bequest; and we are unable to see that avoiding the bequest produces any result in the administration of the trust not contemplated by the testator.

But it is not so with the trusts in favor of the grandchildren. The division of the property which lies at the foundation of those trusts is essential to and a part of the illegal bequest. Moreover those trusts are mere incidents growing out of the illegal bequest; more than that, they are a part of it, and must fall with it.

The Superior Court is advised to adjudge the bequest to the grandchildren and their issue and the trusts in their favor void, and the trusts in favor of the daughters valid.

In this opinion the other judges concurred.

53	576
58	488
53	576
60	169

DEXTER R. WRIGHT AND OTHERS *vs.* THE NORTH SCHOOL DISTRICT.

A school district meeting was called "for the purpose of obtaining information with regard to the recent assessments upon the property in the district." At the meeting a vote was passed appointing a committee to make the investigation, with power to employ counsel. The committee employed counsel, who instituted certain legal proceedings. Held that the warning of the meeting did not authorize a vote under which legal proceedings could be instituted, and that the district was not liable for the services of the counsel employed.

A later meeting was called "to take action with regard to rescinding the doings" of the former meeting, at which it was voted not to rescind. Held that, as the original vote was itself illegal, no inhabitant of the

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district was under the necessity of attending a meeting for the purpose of rescinding it, while the vote not to rescind could not give effect to the original vote.

[Argued December 9th, 1885—decided March 12th, 1886.]

ACTION to recover for services as attorneys at law; brought to the Court of Common Pleas, and tried to the court before *Torrance, J.* Facts found and judgment rendered for the plaintiffs. Appeal by the defendants. The case is fully stated in the opinion.

L. N. Blydenburgh, for the appellants.

W. L. Bennett, for the appellees.

PARDEE, J. In December, 1882, the committee of the North School District in the town of Orange posted a notice for a meeting of the voters therein, "for the purpose of obtaining information with regard to the recent assessment upon the property situated in said district." At that meeting the following vote was passed:—"Whereas, the management of the affairs of the Allingtown School District having proved unsatisfactory to many of the residents of said district, be it therefore resolved, that this meeting appoint a committee of two, who shall employ the services of a competent person residing outside of Allingtown district to audit the accounts of said district; said auditing of accounts to go back as far as may be found necessary by said committee and auditor. Said committee shall have power to employ counsel if necessary." Messrs. Ansel Hurlburt and John P. Forbes were appointed by the meeting to act as such committee.

The committee so appointed at once entered upon the duties of its appointment, and applied to the officers of the district for information as to the financial affairs of the district, and for leave to examine the books thereof, but were refused all such information, and leave to examine the books or accounts was denied.

The committee then applied to the plaintiffs, a firm of

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legal practitioners, for counsel and advice in the matter. As part of the means employed for the purposes for which the committee was appointed the plaintiffs brought a suit for an injunction. More than half of their claim is on account of this suit.

On March 7th another meeting was holden upon the following notice:—

“Notice. March 3d. All legal voters of the North School District, town of Orange, are hereby warned to meet at their school house in said district on Wednesday, March 7th, 1883, at half past 7 o'clock P. M., to take action in regard to rescinding the doings of a former meeting, held on the 16th December, 1882, to rescind a resolution to appoint a so called investigating committee. Wm. M. Gilbert, District Committee.”

The following is the record of the proceedings of this meeting:—“Motion made and seconded that a resolution passed on the 16th December, 1882, be rescinded. Voted, not to rescind, by a majority of one. Voted, to adjourn.”

The legal assessment of a tax by a school district involves public notice, public meeting, and a record accessible to all persons interested. Presumptively knowledge of all attendant facts must be in possession of individuals within the district; therefore a notice to meet for the purpose of obtaining information imports no more than that, at a fixed time and place, those who by virtue of their office have that knowledge will be present and impart it to those who may desire it, upon simple inquiry, and inexpensively. Presumably no voter would be unwilling to receive it upon those terms; presumably also many would be unwilling to pay therefor the cost of a bill in equity. No one of them was bound to find in the notice warning of such possibility as this last. In the speech of the people, when a man says that he intends to obtain information upon a specified subject, he is not as a rule understood to mean that he will accomplish his purpose at the cost of proceedings in court. A school district is to be made responsible for the expenses of legal proceedings instituted by individuals for the pur-

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pose of testing the validity of an assessment only upon a vote plainly declaring or necessarily implying that it will be thus bound, passed at a meeting upon a notice expressly setting forth such vote to be a purpose for which it is called. Therefore the meeting of December 11th, 1882, could not legally bind the district to the payment of the expenses of the bill in equity for the purpose of obtaining information. And inasmuch as the district had come under no obligation to do this by reason of any vote passed thereat, no voter was required to attend the meeting called to rescind; the immunity of the district was perfect; no subsequent inaction could affect it; it could be taken from it only by positive vote, upon clear notice, that it would pass.

There is error in the judgment complained of.

In this opinion the other judges concurred.

HUBERT W. TODD *vs.* HENDRICK H. MUNSON AND WIFE.

An express trust in real estate can not be proved by parol.

In suits to enforce contracts, correct mistakes, and punish or prevent frauds, it is often necessary to show incidentally an express trust by parol. The distinction is between such cases and those that are brought simply to establish or enforce a trust.

Declarations made by a grantor with regard to an intended trust some time after the deed was given, are entirely inadmissible as not even tending to show an arrangement for a trust at the time when the deed was given.

A complaint alleged that a conveyance of certain real estate was made to the defendant "without consideration and upon the parol condition and understanding between herself and the grantor that she should hold an undivided half of it in trust for T., and after the grantor's death should sell it and give half the proceeds to T." Held not demurrable on the ground that the agreement of the grantee was alleged to be by parol, as the grantee, having received the benefit of the grant, could be compelled to perform the agreement on her part.

Where the allegations of a complaint or defense, which are manifestly insufficient in substance, are yet traversed and found true on the traverse, it does not necessarily follow that the party in whose favor the issue is found is entitled to judgment.

53	579
59	143
61	210

53	579
66	204
66	499

53	579
67	378

53	579
71	583

58	579
75	6

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The case of *Powers v. Mulvey*, 51 Conn. R., 482, explained.

Instructions by a grantor to an attorney drawing a deed are not ordinarily privileged communications. If the grantor had instructed the attorney to make the conveyance to the grantee in trust, it would be competent for the attorney to testify that such were the instructions.

[Argued December 18th, 1885—decided March 26th, 1886.]

SUIT to set aside a deed, for an injunction, and for damages; brought to the Superior Court.

The deed described in the complaint was dated May 31st, 1883, and was executed by Ambrose Todd and Jane R. Todd, his wife, to the defendant Emily C. Munson, their daughter. The plaintiff, a son, and the only other child of the grantors in the deed, sought by this proceeding to set the deed aside on the ground of the incompetence of the grantor Jane R. Todd, who was owner of the property, and of undue influence exerted by the defendants. The defendants in their answer denied the incompetency and undue influence, and set up an unrecorded deed of the same property from the same grantors to the said Emily, dated June 11th, 1881. To this answer the plaintiff replied that if the last mentioned deed was ever executed, it was obtained by the fraud and misrepresentations of the defendants. The plaintiff afterwards amended his complaint by alleging that the deed of June 11th, 1881, although absolute on its face, was without consideration, and was given upon the parol condition and understanding that the grantee should hold one half of the property for the plaintiff, and after the death of the grantors should sell it and give one half the proceeds to the plaintiff, and in the amended complaint prayed that the deed be reformed so as to express the trust, and that the trust be enforced. The defendants denied the allegations of the amended complaint. The case was heard before *Sanford, J.*, who made the following finding of facts:—

On the trial the plaintiff put in evidence the deed of June 11th, 1881, and proved its execution by the testimony of Julius C. Cable, who was a witness to the deed, and took its acknowledgment. Mr. Cable was then asked by the

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plaintiff's counsel (in support of the allegation of the amended complaint that the deed, though absolute in form, was subject to a parol trust in favor of the plaintiff), to state what was said to him by the grantor, Ambrose Todd, in the presence of the other grantor, when the deed was drawn, as to its purpose; the plaintiff proposing to prove by him that Mr. Todd declared at the time of the execution of the deed in the presence of Mrs. Todd and of Mr. Cable, "that the purpose of the deed was that Mrs. Munson could hold the property, and, subsequent to the death of Mr. and Mrs. Todd, sell or divide the property, and give half to the plaintiff, Hubert Todd; also that at the same interview it was suggested by Mr. Todd that Mr. Cable should take and hold the deed himself for the purpose indicated."

The witness being examined by the defendants' counsel on his *voir dire*, testified that he was, at the time the deed was drawn, an attorney and counsellor at law and a member of the New Haven County bar; that he then was, and for some time before had been, the legal adviser of the grantors, and that the deed was drawn under his advice and direction as the result of a consultation by his clients with him as to the proper mode of the disposition of the property.

This testimony of Mr. Cable was objected to by the defendants' counsel, as calling for communications between client and counsel, privileged by law. It was upon that ground excluded, and the plaintiff excepted.

The plaintiff, in support of the same allegation of his amended complaint, offered to prove by his own testimony a declaration made by his mother, Mrs. Todd, one of the grantors, to himself, in the winter of 1883, to the effect that "the property was left in such shape that he was to have one half of it when it was disposed of at her death."

To this testimony the defendants objected as inadmissible, 1st, because it was offered as parol evidence to prove an express trust; and 2d, because the claimed declaration was not made until after the execution and delivery of the

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deed in controversy. The evidence was excluded, and the plaintiff excepted.

The plaintiff, in support of the same allegation of the amended complaint, offered the testimony of his wife, Mrs. Hubert Todd, that Ambrose Todd, one of the grantors, during his last illness, which was in May, 1882, made to her declarations of his intentions as to the division of the property conveyed by this deed. This testimony was objected to by the defendant upon the same grounds as above stated, and excluded, and exception taken.

There was no pecuniary consideration paid by Mrs. Munson to her parents for the property conveyed to her.

She testified that the first time she learned of any claim to the effect that she held the property upon any trust in favor of her brother, Hubert Todd, was after service was made of the complaint in this cause.

Upon these facts the court dismissed the complaint, and the plaintiff appealed.

T. H. Russell and *E. P. Arvine*, for the appellant.

1. If the deed of June 11th, 1881, was obtained by Mrs. Munson on the understanding and agreement that she should give half to Hubert Todd and she refuses so to do, or if she knew that the grantors intended the deed for that purpose and expected that she would carry out such intention, and she obtained possession of it knowing that such was their expectation and belief, and now refuses to carry out the same, then she is guilty of fraud, and the court will either enforce the agreement specifically or set the conveyance aside for fraud. *Peck v. Hoyt*, 39 Conn., 9; *Dowd v. Tucker*, 41 id., 204.

2. The defendants claim that the declarations of the grantors were inadmissible because the agreement claimed could not be proved by parol. But it was too late to make this claim, as all objection to the sufficiency of the complaint was waived by the pleadings. It distinctly sets out as the ground of action a parol agreement in regard to the deed of 1881. Having answered over to the merits, it is

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now too late for the defendants to object that we cannot prove such an agreement. They should have taken the objection by demurrer. *Powers v. Mulvey*, 51 Conn., 432; *Trowbridge v. True*, 52 id., 190; *Merwin v. Richardson*, id., 224. The case of *Trowbridge v. True* is on all fours with this, because it was an attempt to raise a question on objection to evidence which should have been raised by demurrer.

3. But the objection, even if not waived, cannot be sustained. The trust claimed in the case can be proved by parol. *Crocker v. Higgins*, 7 Conn., 347; *Belden v. Seymour*, 8 id., 304; *Parsons v. Camp*, 11 id., 525; *Meeker v. Meeker*, 16 id., 383; *Church v. Sterling*, id., 388; *Collins v. Tillou*, 26 id., 368; *Clark v. Tappin*, 32 id., 66; *Booth's Appeal from Probate*, 35 id., 168; *Peck v. Hoyt*, 39 id., 13; *Dowd v. Tucker*, 41 id., 201; *Hubbard v. Ensign*, 46 id., 582; *Hoge v. Hoge*, 1 Watts, 163; *Foote v. Foote*, 58 Barb., 258; *Williams v. Fitch*, 18 N. York, 548; *Chamberlaine v. Chamberlaine*, Freeman's Cas. in Cha., 34; *Oldham v. Litchford*, 2 Vern., 506; *Haigh v. Kaye*, L. R., 7 Cha. App., 469; 1 Story Eq. Jur., § 256; 2 id., § 972, note a.

4. The English statute of frauds enacted "that all declarations or creations of trust or confidence in any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." Perry on Trusts, § 73. Our statute expressly leaves out this clause. Gen. Statutes, p. 441. Many of the states have followed the English statute. Perry on Trusts, § 80. It is so in Vermont, Massachusetts and Wisconsin. Perry on Trusts, § 81. In states where the statute of frauds is not in force, trusts may be proved by parol. Perry on Trusts, §§ 77, 85. As the clause forbidding parol trusts is left out of our statute we stand in regard to such trusts in the same condition as those states where there is no statute of frauds.

5. The evidence of the declarations of Mr. and Mrs. Todd, as to the purpose of the deed and disposition of the property, was admissible to show the intent of the deed.

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In *Russell v. Jackson*, 10 Hare, 204, an action was brought by an heir to set aside a bequest to certain other parties, on the ground that it was given on a parol trust that was void, and evidence was admitted, not only of the instruction to counsel, but of a declaration made to him subsequently. In *Whitney v. Wheeler*, 116 Mass., 492, the question was whether a certain act was intended to constitute a gift, and evidence of declarations of the alleged donor, made before and after the alleged gift, was admitted to show a settled state of mind to the contrary. On a question as to whether a will was obtained by fraud, declarations of the intentions of the testator made after its execution were held admissible by our own court. *Canada's Appeal from Probate*, 47 Conn., 462.

6. The evidence of Mr. Cable was admissible. Weeks on Attorneys, §§ 165, 177; 1 Phill. Ev., 162; Wharton on Ev., § 591. It was not against the interest of his clients nor is the objection taken by them or their legal representatives.

J. S. Beach, for the appellees.

1. Under the testimony of Mr. Cable as given by him upon his *voir dire*, it was the duty of the court to exclude his evidence. It was not admissible under the well settled general rules of law, as applied to such communications. "The general rule is not disputed, that confidential communications between client and attorney are not to be revealed at any time. The privilege indeed is not that of the attorney but of the client, and it is indispensable for the purposes of private justice." Per STORY, J., in *Chirac v. Reinicher*, 11 Wheat., 294. "The rule which holds communications by client to counsel privileged from disclosure, is one of public policy, in the interests of justice, and to maintain its administration." *State v. Barrows*, 52 Conn., 326. And upon principle and by logic, as well as by precedent, this excluded testimony is within the class of communications privileged from disclosure. In *Sanford v. Remington*, 2 Ves. Jr., 189, the Chancellor held that an attorney should not be permitted as a witness to disclose "the conversation

as to the deed, with regard to what was communicated, or as to the reasons for making it." From *Linthicum v. Remington*, 5 Cranch C. C., 546, we quote:—"Mr. Coxe for the plaintiff offered to examine Mr. Marbury as to the facts stated to him by Offut, when he requested Mr. Marbury to draw a deed for him. Mr. Marbury was an attorney and counsellor of this court, and often drew conveyances, and, having been sworn on his *voir dire*, said that he considered the communications as having been made to him in his capacity of attorney, counsellor and conveyancer. The court refused to permit Mr. Marbury to state the facts which were communicated by, and the advice he gave to Offut." In *Lockhard v. Brodie*, 1 Tenn. Ch., 384, the head note is:—"An attorney retained by the husband to aid in having land bought by the husband at chancery sale, conveyed to the wife, cannot be heard to disclose any communication made pending the relation, touching the purpose of the conveyance." In *Bank of Utica v. Mersereau*, 3 Barb. Ch., 528, the head note reads:—"An attorney employed to prepare a deed should not be allowed to disclose any communication made to him by his client concerning the object and subject matter of such deed." Chancellor WALWORTH, in an elaborate opinion says:—"I think the true principle in reference to privileged communications between attorney and client to be, that where the attorney is professionally employed, any communication made to him by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication." In *Whiting v. Barney*, 38 Barb., 397, it was claimed that as one of the parties had died, and as he might, if living, be called upon to prove the facts which were stated by him to his attorney at the time the deed was drawn, the other party was entitled to the testimony of the attorney. But the court held as to such communications that "the seal of the law, once fixed upon them, remains forever, unless removed by the party himself in whose favor it was there placed." It would be easy, if

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needful, to extend this list, by adding authorities, all tending in the same direction.

2. The declarations *claimed* to have been made by the grantors, to the plaintiff and to the plaintiff's wife, after the execution and delivery of the deed to the grantee, were rightly excluded. The word "*claimed*" is emphasized, as indicating the danger of admitting as evidence what a witness says a dead man said, to the end that the court shall thereby find that to be false which the dead man while in life has, under his hand and seal, certified to be true. At the best it is what Lord Coke calls "the uncertain testimony of a slippery memory," but when that memory is lubricated by anticipated lucre, the danger that it may slip and slide beyond the limits of exact truth is so multiplied as to become fearful. Therefore it is that the law interposes, and will not permit any witness, interested or not, to engraft an express trust on an absolute deed by his "word of mouth" statements. An implied or resulting trust may be proved by parol evidence, showing the surroundings of the transaction,—as that, although the grantee named in the deed is *A*, the consideration money paid belonged to *B*; but it is settled law that an express trust cannot be so created. In England and in most of the states the law is so settled by direct enactments of parliament and of legislatures. But in Connecticut it is so settled by the construction which its judiciary has uniformly given to the common law and to the statute of frauds. *Dean v. Dean*, 6 Conn., 285, is the leading case on this point, and its authority, though questioned by the Texas courts, has always been accepted as rightly announcing the law of this state. "An express trust in relation to land conveyed by an absolute deed, expressed to be for a valuable consideration received, cannot, in the absence of fraud, accident or mistake, be proved by parol; such evidence being precluded both by the principles of the common law and by the statute of frauds and perjuries. * * *

The plaintiff offers parol testimony, and that only in support of the facts stated as a ground of relief. The judge who tried the cause at the circuit rejected the proof. It is

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difficult to imagine how he could have decided otherwise. * * * By the plaintiff's allegations it appears that the parties to this deed entered into an arrangement by which the estate granted should be holden in trust. Now the case turns upon this proof. I am of the opinion that the plaintiff cannot be permitted, according to the established principles of law, to prove the facts on which he urges his claim for relief by parol testimony." In *Vail's Appeal from Probate*, 37 Conn., 198, the court say:—"We do not doubt the admissibility of parol evidence to prove an express trust in relation to personal estate, although the rule is otherwise in relation to real estate." But even if the law was not so settled, and if it was open to the plaintiff to offer parol testimony of the declarations of the grantors to prove the claimed trust, such declarations to be admissible must be of a time prior to, or cotemporaneous with, the execution and delivery of the deed. All that need be said on this point is summed up and condensed in *Perry on Trusts*, § 77, and is sustained by the authorities there cited. "The declarations of the grantor to create a trust must be prior to or cotemporaneous with the conveyance, for it would be against reason and the rules of evidence to allow a man who has parted with all interest in an estate to charge it with any trust or encumbrance after such conveyance." Both of these offered declarations were conceded to have been made, if made at all, one, months, and the other, years, after the delivery of the deed to the grantee.

CARPENTER, J. This action as originally brought was to set aside a deed for fraud and undue influence. The defendants in their answer set up another and prior deed, and the plaintiff, in an amended complaint, asks—1st, to have the prior deed reformed so as to express an alleged trust, and 2d, that the trust be enforced.

On the trial the plaintiff offered to prove the supposed trust by parol, and by the testimony of the attorney who drew the deed. An objection to this testimony was sustained by the court, and, judgment having been rendered

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for the defendants, the plaintiff appealed. The objection to the evidence is two-fold—1st, that the offer called for privileged communications; 2d, that parol evidence is inadmissible to prove an express trust. The court below excluded the evidence on the first ground.

Instructions by a grantor to an attorney drawing a deed are not ordinarily privileged communications. *Hatton v. Robinson*, 14 Pick., 416; *Hebbard v. Haughian*, 70 N. York, 54. The tenth paragraph of the complaint alleges an agreement between the grantors and the grantee that the grantee should hold one half of the property conveyed in trust for the plaintiff. Now if the grantors pursuant to such an agreement had instructed the attorney to prepare a deed expressing therein such a trust, we do not see why it would not be competent for the attorney to testify that such were his instructions. But the difficulty is that the record does not show the precise nature of the communications from the grantors which the plaintiff expected to prove. It appears that he offered to prove by the declaration of one of the grantors made at the time the deed was executed, "that the purpose of the deed was that Mrs. Munson could hold the property, and, subsequent to the death of Mr. and Mrs. Todd, sell or divide the property and give half to the plaintiff." Now it may be that that purpose was the result of his consultation with his attorney—that it was what his attorney advised or directed; and, on the other hand, it may be that the declaration, whatever it was, was intended as an instruction to the attorney to prepare a deed expressing therein such a trust as the purpose contemplated. This latter supposition however seems to be excluded by the pleadings; for it is not alleged that the deed was not written according to the instructions; it is not alleged even that the deed is not just as the grantors intended it should be. We are thrown back then upon an express parol trust as the object of the proof to be gathered from the declarations. As it is possible that such a trust can only be shown by bringing before the court the private conferences between the client and his attorney, it is not clear that the court

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erred in excluding the evidence on that ground. But we think the evidence was inadmissible for the reason that an express trust in real estate cannot be proved by parol. It was so decided in *Dean v. Dean*, 6 Conn., 285, and that was recognized as law in *Vail's Appeal from Probate*, 37 id., 198. We are aware of no case in which a contrary doctrine has been held. The plaintiff's counsel cite several cases which seem to be inconsistent with this principle, but the conflict is in appearance only and is not real. Property held in trust, like other property, may be the subject of contracts, of mistakes, and of fraud. In suits to enforce contracts, correct mistakes, and punish or prevent fraud, it is often necessary to show incidentally an express trust by parol. In considering this subject the distinction between such cases and cases brought simply to establish or enforce a trust, must be borne in mind; and this distinction will reconcile the cases. We will briefly notice some of the more prominent cases referred to.

Crocker v. Higgins, 7 Conn., 342. *A* conveyed land to *B*, *B* paying therefor about one half the value of the land in money, and agreeing to give *C* a life lease of the premises. The court enforced the agreement to give a lease. Performance by *A* took the case out of the statute of frauds.

Collins v. Tillou, 26 Conn., 368. *A* constituted *B* his agent to sell real estate and account to him for the proceeds. The land was conveyed to *B* for that purpose by an absolute deed. In a suit against *B* for not accounting, it was held that the purpose for which the deed was given, and the consideration, might be shown by parol. The fact that he held the real estate in trust did not prevent *A* from proving *B*'s contract to account for the proceeds of the sale. Moreover the trust in that case may be regarded as an implied one, being a contingent resulting trust arising from the want of a consideration.

Booth's Appeal from Probate, 35 Conn., 168. Several brothers and sisters purchased land under an agreement that one of their number should take the title and hold it in trust for the mother during her life and after her death

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for themselves. The property came into the hands of a sister, who received it with knowledge of the trust, and she sold it to a stranger. After the death of the mother she was held liable to the brothers and sisters for the money received for the land. Two things are noticeable; first, that the trust for themselves after the death of the mother was a resulting trust, implied from their payment of the consideration, as well as an express one; second, that there was a contract obligation on the part of the first trustee, which, by the *scienter*, bound the second. To allow her to repudiate the trust would operate as a fraud upon the others.

Peck v. Hoyt, 39 Conn., 9. A widow deeded land to a person not a relative, upon no other consideration than that she supposed he would be to her a son, and care for and support her as his mother during life. This he refused to do. On a bill to set aside the deed it was held that the circumstances were equivalent to a contract by the grantee to do what the grantor supposed would be done, and the deed was set aside. In that case too, the consideration failing, it may properly be regarded as the case of an implied trust rather than an express one.

Dowd v. Tucker, 41 Conn., 197. A testatrix being about to make a codicil to her will in favor of another, the beneficiary under the will promised, if the will were allowed to stand, that he would carry out her intentions. On a bill in equity it was held that he held the property in trust for the proposed devisee. But the trust was not express, it was implied. The promise was not to hold the property in trust, but to convey it. Until he did so the law raised the trust. Again, unless he did convey his promise was a fraud upon the proposed devisee, and on that ground the decision rests.

The plaintiff, for the purpose of proving the alleged trust, offered in evidence the declaration of Mrs. Ambrose Todd to himself, and the declaration of Ambrose Todd to the wife of the plaintiff, both declarations having been made some time after the deed was given. This evidence was objected to and excluded. It is difficult to see how these

declarations could even tend to prove the agreement to hold in trust alleged to have been made at or before the time the deed was given. In addition to the objection that it is an attempt to prove an express trust by parol, it is open to the further objection that it is an attempt to prove it by the mere declarations of the grantors long after they had parted with all interest in the property.

It has been suggested that, the deed being without consideration, the purpose of the grantors in giving the deed, as soon as known to the grantee, at any time, became binding upon her. The suggestion is sufficiently answered by saying that it does not appear that any such question was made in the court below, and the reasons of appeal present no such question.

The plaintiff makes another question in reply to the objections to the evidence, and that is, that the complaint having alleged that the trust was by parol, and the defendants not having demurred, the objection is waived and was not properly taken on the trial. In support of this proposition he cites *Powers v. Mulvey*, 51 Conn., 482, *Merwin v. Richardson*, 52 id., 224, and *Trowbridge v. True*, 52 id., 190. The leading case and the one principally relied on is *Powers v. Mulvey*. That case seems to have been understood as going further than the court intended to go. The point decided was that, a sufficient defense having been found true, judgment should have been rendered for the defendant. It does not follow that a complaint or defense, found true on a traverse, and which is manifestly insufficient in substance, entitles the party to a judgment. The reasoning of the court must be understood with reference to the facts of the case and must not be applied to facts materially different, especially if such an application will lead to absurd consequences. But, without noticing that case further, we think the complaint in this case is not demurrable. It alleges an agreement by the grantee to own one half of the premises in trust for the plaintiff, and, after the death of the grantors, to sell the same and give one half the avails thereof to the plaintiff. It presents the ordinary case of

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one party having received the benefits of a contract refusing to perform it on his part. The fact that the agreement incidentally involved a trust will not prevent the plaintiff from proving the contract. *Crocker v. Higgins*, 7 Conn., 342, is a direct authority for holding such a complaint good.

The difficulty with the plaintiff's case is that he does not attempt to prove the case he has alleged. The testimony offered totally fails to establish any contract. It is a bold attempt to prove a trust by the mere naked declarations of the grantors, made in the absence of the grantee at the time, and after the deed was given. We think that cannot be done.

There is no error in the judgment appealed from.

In this opinion the other judges concurred; except PARK, C. J., who dissented.

APPENDIX.

JUDGES AND OFFICERS OF THE SUPERIOR COURT.

Section first of chapter fifty-first of the public acts of eighteen hundred and eighty-five authorized and directed the state librarian "to prepare a list of the Judges of the Superior Court, of the Clerks of said court, of the State's Attorneys and of the Sheriffs, with the dates of their respective appointments and terms of service from the organization of said court, for publication in the volume of the Connecticut Reports issued next after such list shall be prepared."

The following lists have been prepared in compliance with said section.

CHARLES J. HOADLY,
State Librarian.

THE SUPERIOR COURT.

The Court of Assistants was established in October, 1665, to consist of at least seven assistants, to have original cognizance of all crimes relating to life, limb or banishment, and to have appellate jurisdiction in other cases. Until 1701 the sessions of this court were held in Hartford only, but after that date the May term was held at Hartford and the October term at New Haven, annually.

At the May session of the General Assembly, 1711, an act was passed reciting that it had been found in many respects inexpedient and chargeable, to have but two places as well as but two terms annually for holding this court, and establishing a Superior Court, to be held twice annually in each of the four then existing counties, by one chief judge and four other judges, any three of whom to be a quorum. In the years 1722 and 1755 there were but three judges appointed besides the chief. The chief judge first designated was the Governor, or in his absence the Deputy Governor, and the other judges were members of the

Judges and Officers of the Superior Court.

council, or upper house of the General Assembly, commonly called Assistants. After May, 1712, the office of chief judge was ordinarily held in connection with that of deputy governor, and, with but four exceptions, the other judges were all members of the council at the time of their several appointments.

An act was passed in May, 1784, by which the office of judge of the Superior Court was declared incompatible with a seat in the legislature of this state or in that of the United States. Another section of this act constituted the Lieutenant-Governor and Council for the time being the Supreme Court of Errors. In October, 1801, it was provided that the Superior Court should consist of six members. In May, 1806, the judicial power of the governor and council was transferred to the judges of the Superior Court, who were thereafter to constitute the Supreme Court, and the judges were increased from six to nine, which continued to be the number, save in the year 1814-15, when but seven were appointed besides the chief, until a law was passed at the October session, 1818, providing that after the first of June, 1819, the Superior Court should consist of one chief judge and four assistant judges, and that the sessions of the court should be held by any one, instead of by three of them; except in capital cases, as directed by an act passed May, 1819.

In 1855 the County Court was abolished and four judges who were not members of the Supreme Court were added to the bench of the Superior Court. For a time the judges designated to hold the Supreme Court were excused from circuit duty on the court below, but at the May session, 1861, it was enacted that the Superior Court should consist of nine judges, including the judges of the Supreme Court of Errors. This number was increased to ten in 1867, and to eleven in 1870, which is the present number.

From 1711 to the adoption of the constitution in 1818, the appointment of judges by the General Assembly was annual: from 1819 to 1855 their tenure of office was during good behavior and until the age of seventy years: from 1855, in accordance with a constitutional amendment, they hold their offices for the term of eight years.

In May, 1784, it was enacted that the judges of the Superior Court should thereafter hold their offices during the pleasure of the General Assembly, but that pleasure continued to be manifested annually, as before, and this paragraph was repealed in May, 1794.

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JUDGES OF THE SUPERIOR COURT.

Date of Appointm't.		To
May, 1711.	GURDON SALTONSTALL, or in his absence NATHAN GOLD, Dep. Gov., C. J.,	1712
	WILLIAM PITKIN, C. J. 1713-14,	1715
	RICHARD CHRISTOPHERS,	1721
	PETER BURR,	1721
	SAMUEL EELLS,	1740
May, 1712.	NATHAN GOLD, C. J.,	1713
May, 1713.	JOHN HAYNES,	1714
May, 1714.	NATHAN GOLD, C. J.,	1723
May, 1715.	JONATHAN LAW,	1716
May, 1716.	JOHN HAMLIN,	1722
May, 1717.	JONATHAN LAW, C. J. 1725,	1741
May, 1721.	JOSEPH TALCOTT,	1722
May, 1722.	PETER BURR, C. J. 1723,	1725
May, 1723.	MATTHEW ALLYN,	1732
	JOHN HOOKER,	1732
May, 1725.	JAMES WADSWORTH,	1752
May, 1732.	ROGER WOLCOTT, C. J. Oct. 1741,	1750
	JOSEPH WHITING,	1745
May, 1740.	ELISHA WILLIAMS,	1743
Oct., 1741.	WILLIAM PITKIN, C. J. 1754,	1766
May, 1743.	EBENEZER SILLIMAN,	1766
May, 1745.	JOHN BULKELEY,	Ob. July 21, 1753
Nov., 1750.	THOMAS FITCH, C. J.,	1754
May, 1752.	SAMUEL LYNDE,	1755
Oct., 1753.	DANIEL EDWARDS—Did not take his seat,	1754
May, 1754.	ROGER WOLCOTT, Jr.,	Ob. Oct. 19, 1759
	JOSEPH FOWLER,	1760
May, 1756.	DANIEL EDWARDS,	Ob. Sept. 6, 1765
Oct., 1759.	BENJAMIN HALL,	1766
May, 1760.	ROBERT WALKER,	Ob. July 13, 1772
Oct., 1765.	MATTHEW GRISWOLD, C. J. Oct. 1769,	1784
May, 1766.	JONATHAN TRUMBULL, C. J.,	Oct. 1769
	ELIPHALET DYER, C. J. Oct. 1789,	1793
	ROGER SHERMAN,	1789
Oct., 1769.	WILLIAM PITKIN,	1789
Oct., 1772.	WILLIAM SAMUEL JOHNSON,	1773
May, 1773.	SAMUEL HUNTINGTON, C. J. 1784,	1785

Judges and Officers of the Superior Court.

Date of Appointment.	To.
May, 1784. RICHARD LAW, C. J. 1785,	1789
May, 1785. OLIVER ELLSWORTH,	1789
May, 1789. ANDREW ADAMS, C. J. 1793,	1798
JESSE ROOT, C. J. 1798,	1807
CHARLES CHAUNCEY,	1793
Oct., 1789. ERASTUS WOLCOTT,	Oct. 1792
Oct., 1792. JONATHAN STURGES,	1805
May, 1793. BENJAMIN HUNTINGTON,	1798
ASHER MILLER,	1795
Oct., 1795. STEPHEN MIX MITCHELL, C. J. 1807,	1814
May, 1798. JONATHAN INGERSOLL,	1801
TAPPING REEVE, C. J. 1814,	1815
Oct., 1801. ZEPHANIAH SWIFT, C. J. 1815,	1819
JOHN TRUMBULL,	1819
Oct., 1805. WILLIAM EDMOND,	1819
Oct., 1806. NATHANIEL SMITH,	1819
JEREMIAH GATES BRAINARD,	1829
SIMEON BALDWIN,	1818
May, 1807. ROGER GRISWOLD.	1809
Oct., 1809. JOHN COTTON SMITH,	1811
May, 1811. JONATHAN INGERSOLL,	1816
May, 1815. CALVIN GODDARD,	1818
STEPHEN TITUS HOSMER, C. J. 1819; Jan. 10, 1833	
May, 1816. JAMES GOULD,	1819
May, 1818. JOHN THOMSON PETERS,	Ob. Aug. 28, 1834
ASA CHAPMAN,	Ob. Sept. 25, 1825
May, 1819. WILLIAM BRISTOL,	1826
May, 1826. JAMES LANMAN,	1829
DAVID DAGGETT, C. J. Jan. 10, 1833; Dec. 31, 1834	
May, 1829. THOMAS SCOTT WILLIAMS, C. J. from Dec. 30,	
1834,	1847
CLARK BISSELL,	1839
May, 1832. SAMUEL CHURCH, from Jan. 10, 1833; C. J.	
1847,	Ob. Sept 15, 1854
May, 1834. JABEZ WILLIAMS HUNTINGTON, from Oct. 11,	
1834,	1840
HENRY MATSON WAITE, from Dec. 30, 1834;	
C. J. Sept. 15, 1854,	Feb. 9, 1857
May, 1839. ROGER MINOT SHERMAN,	1842
May, 1840. WILLIAM LUCIUS STORRS, C. J. Feb. 9, 1857,	
Ob. June 25, 1861	

Judges and Officers of the Superior Court.

Date of Appointment.	To.
May, 1842.	JOEL HINMAN, C. J. June, 1861, Ob. Feb. 21, 1870
May, 1847.	WILLIAM WOLCOTT ELLSWORTH, Nov. 10, 1861
May, 1854.	DAVID CURTIS SANFORD, from Sept. 13, 1854, Ob. May 10, 1864
May, 1855.	JOHN DUANE PARK, Supreme Court from July 4, 1864; C. J. from Feb. 9, 1874. THOMAS BELDEN BUTLER, Supreme Court 1861; C. J. from May 13, 1870, 1873 ORIGEN STORRS SEYMOUR, 1863 LOREN PINCKNEY WALDO, 1863
May, 1856.	CHARLES JOHNSON McCURDY, Supreme Court from July 10, 1863, Dec. 7, 1867
May, 1861.	HENRY DUTTON, Supreme Court, Feb. 12, 1866 ELISHA CARPENTER, Supreme Court from Feb. 11, 1866.
May, 1863.	JAMES PHELPS, from July 4, 1863; Supreme Court from July 2, 1873, May 21, 1875 DWIGHT WHITFIELD PARDEE, from July 4, 1863; Supreme Court from Feb. 9, 1874.
May, 1864.	DWIGHT LOOMIS, from July 4, 1864; Supreme Court from June 3, 1875.
May, 1865.	GIDEON HALL, from Feb. 11, 1866, Ob. Dec. 8, 1867
May, 1867.	EDWARD ISAAC SANFORD, from July 27, 1867. MILES TOBEY GRANGER, from July 27, 1867; Supreme Court from Nov. 13, 1876.
May, 1868.	WILLIAM THOMAS MINOR, from Aug. 1, 1868, Nov. 15, 1873
May, 1870.	LA FAYETTE SABINE FOSTER, Supreme Court from July 15, 1870, Nov. 12, 1876 ORIGEN STORRS SEYMOUR, Supreme Court; C. J. from June 5, 1873, Feb. 9, 1874
May, 1874.	SIDNEY BURR BEARDSLEY, from June 15, 1874. ROLAND HITCHCOCK, from June 15, 1874, 1882 EARL MARTIN, from June 15, 1874, 1882
May, 1875.	MOSES CULVER, Ob. Oct. 21, 1884
May, 1876.	JAMES ALBERT HOVEY, April 28, 1885
Jan., 1882.	CHARLES BARTLETT ANDREWS, fr. June 15, 1882. HENRY STODDARD, from June 15, 1882.
Jan., 1885.	JAMES PHELPS, from Jan. 28, 1885. DAVID TORRANCE, from April 29, 1885.

 Judges and Officers of the Superior Court.

CLERKS OF THE SUPERIOR COURT. -

THE act establishing the Superior Court, May, 1711, gave the judges of said court full power to appoint and swear a Clerk. Until 1798 there was but one clerk, who rode the circuit with the court, but at the May session of that year the legislature impowered and directed the judges to appoint and swear a clerk in and for each county; and it was also enacted, that the then existing records of the court should be placed and in future kept in the office of the secretary of this state, at Hartford, who was vested with all the powers and directed to perform all the duties of clerk of said court in all matters relating to said records. In 1833 it was enacted, that the clerks appointed by the several county courts should be clerks of the superior courts. This law was repealed in 1834, re-established in 1835, again repealed in 1838, and again re-established in 1842, and so continued until the abolition of the county court in 1855, when the appointment of clerks and assistant clerks was vested in the judges of the superior court at their annual meetings. The official term is for one year commencing, since 1856, on July 4th.

In the following list no account is made of clerks appointed for a term or in the absence of the regular clerk.

September 4, 1711,	JONATHAN LAW,		to 1714
March 23, 1714,	CHRISTOPHER CHRISTOPHERS,		1729
March 4, 1728,	DANIEL EDWARDS,		1756
December 28, 1756,	GEORGE PITKIN,		1798

The lists of clerks in the several counties from 1798 to 1855 are made up from the Connecticut Register: since 1855, from the official record.

 CLERKS, HARTFORD COUNTY.

Date of Appointment.	To.
1798. GEORGE PITKIN,	
1806. THOMAS CHESTER,	
1831. JARED GRISWOLD,	Ob. Nov. 22, 1835
1835. PHILO A. GOODWIN.	
1838. JAMES H. HOLCOMB.	

 Judges and Officers of the Superior Court.

Date of Appointment.	To.
1842.	THOMAS H. SEYMOUR,
1843.	LOREN T. PEASE,
1844.	CHAUNCEY HOWARD,
1846.	LOREN T. PEASE,
1847.	CHAUNCEY HOWARD,
1850.	WILLIAM W. EATON,
1851.	CHAUNCEY HOWARD,
1852.	SAMUEL F. JONES,
1853.	WILLIAM W. EATON,
1854.	WAIT N. HAWLEY,
July 4, 1857.	CHAUNCEY HOWARD,
July 4, 1873.	CHARLES W. JOHNSON.

CLERKS, NEW HAVEN COUNTY.

1798.	ABRAHAM BISHOP,
1801.	DYER WHITE,
1806.	JOHN H. LYNDE,
1807.	DYER WHITE,
1821.	CORNELIUS TUTHILL,
1825.	JOHN BEACH,
1835.	ROBINSON S. HINMAN,
1839.	JOHN BEACH,
1842.	ROBERT H. OSBORN,
1844.	JOHN S. RICE,
1846.	ROBERT H. OSBORN,
1847.	HENRY J. LEWIS,
1850.	ROBERT H. OSBORN,
1854.	ALFRED H. TERRY,
July 4, 1860.	ARTHUR D. OSBORN,
July 4, 1882.	JONATHAN INGERSOLL.

CLERKS, NEW LONDON COUNTY.

1798.	WINTHROP SALTONSTALL,
1809.	CHARLES LATHROP,
1831.	JAMES STEDMAN,

 Judges and Officers of the Superior Court.

Date of Appointment.	To.
1833.	JOHN DE WITT,
1838.	JAMES STEDMAN,
1842.	JOHN DE WITT,
1847.	JAMES STEDMAN,
July 4, 1856.	WILLIAM L. BREWER,
July 4, 1863.	ROBERT COIT, Jr.,
July 4, 1864.	WILLIAM L. BREWER,
July 4, 1875.	WEBSTER PARK,
July 4, 1881.	JOHN C. AVERILL,

CLERKS, FAIRFIELD COUNTY.

1798.	DAVID BURR,	Ob. Feb. 18, 1825
1825.	THOMAS B. OSBORNE,	
1839.	TIMOTHY T. MERWIN,	
1842.	THOMAS ROBINSON,	
1843.	WILLIAM H. NOBLE,	
1844.	THOMAS ROBINSON,	
1846.	BRYANT SMITH,	
1847.	THOMAS ROBINSON,	
1850.	WILLIAM H. NOBLE,	
1851.	THOMAS ROBINSON,	
1852.	WILLIAM H. NOBLE,	
1854.	AMOS S. TREAT,	
July 4, 1859.	ELISHA S. ABERNETHY,	
July 4, 1869.	HENRY T. BLAKE,	
July 4, 1884.	SAMUEL B. SUMNER.	

CLERKS, WINDHAM COUNTY.

1798.	SAMUEL GRAY,
1823.	DAVID C. BOLLES,
1829.	DANIEL P. TYLER,
1830.	DAVID C. BOLLES,
1831.	DANIEL P. TYLER,
1833.	ARMIN BOLLES,
1834.	DANIEL P. TYLER,

Judges and Officers of the Superior Court.

Date of Appointm't.	To.
1835.	ARMIN BOLLES,
1838.	URIEL FULLER,
1839.	DANIEL P. TYLER,
1842.	URIEL FULLER,
1845.	THOMAS GRAY,
1846.	URIEL FULLER,
1847.	THOMAS GRAY,
1849.	DANIEL P. BROWN,
1850.	URIEL FULLER,
1854.	THOMAS GRAY,
July 4, 1856.	URIEL FULLER,
July 4, 1872.	EDWARD L. CUNDALL,
Oct. 27, 1885.	SAMUEL H. SEWARD.

Ob. Oct. 3, 1885

CLERKS, LITCHFIELD COUNTY.

1798.	FREDERICK WOLCOTT,
1836.	ORIGEN S. SEYMOUR,
1845.	GIDEON H. HOLLISTER,
1846.	ORIGEN S. SEYMOUR,
1847.	GIDEON H. HOLLISTER,
1850.	ELISHA JOHNSON,
1851.	GIDEON H. HOLLISTER,
1852.	FREDERICK D. BEEMAN,
1854.	HENRY B. GRAVES,
1855.	FREDERICK D. BEEMAN,
July 4, 1860.	WILLIAM L. RANSOM.

CLERKS, MIDDLESEX COUNTY.

1798.	JOHN FISK,
1847.	ELIHU SPENCER,
1853.	ARTHUR B. CALEF,
July 4, 1859.	WILLIAM W. MCFARLAND,
July 4, 1860.	ARTHUR B. CALEF,
July 4, 1861.	WALDO P. VINAL,
July 4, 1865.	CHARLES G. R. VINAL.

Judges and Officers of the Superior Court.

CLERKS, TOLLAND COUNTY.

Date of Appointment.	To.
1798.	EPHRAIM GRANT, Jr.,
1814.	ELISHA STEARNS,
1833.	NOVATUS CHAPMAN,
1834.	ELISHA STRONG,
1835.	JEREMIAH PARISH,
1846.	WILLIAM W. EATON,
1847.	JEREMIAH PARISH,
1850.	ASA WILLEY,
1851.	JOSEPH BISHOP,
1854.	WILLIAM SUMNER,
1855.	JOSEPH BISHOP,
July 4, 1876.	ERWIN O. DIMOCK.

KING'S AND STATE'S ATTORNEYS.

At the May session of the General Assembly, 1704, an act was passed directing that thenceforth there should be "in every county a sober, discreet and religious person appointed by the county courts to be Attorney for the Queen, to prosecute and implead in the law all criminal offenders, and to do all other things necessary or convenient as an attorney to suppress vice and immorality. And the said attorney's charges and encouragement to be allowed out of the treasury of the county." And the attorneys for the counties of Hartford and New Haven were to prosecute criminals in the Court of Assistants when held in their respective counties. This act does not appear with other laws of the session in the edition of our statutes published in 1715, but it may be found in the printed Colonial Records.

Before this time there had been prosecuting attorneys specially appointed by the General Assembly, as, for instance, WILLIAM PITKIN, in October, 1662. We find, previous to 1700, DANIEL CLARK prosecuting criminals *pro domino rege* before the Court of Assistants: perhaps he received his authority from that court. In 1712 the Governor and Council appointed JOHN REED of Fairfield Queen's Attorney, for a certain purpose, and he seems to have acted as a kind of attorney general for several years, (1711-16,) and in the other counties.

At the October session, 1727, WILLIAM ADAMS of New Haven,

 Judges and Officers of the Superior Court.

PETER PRATT of New London, for himself and for JOHN BISSELL of Hartford, JOSEPH FOWLER of Windham, and THOMAS FITCH of Fairfield, presented a memorial to the assembly, in which they say, "That we humbly conceive that we are not holden or obliged to espouse any pleas of the crown on his majesty's behalf when proffered good fees on the other side, under supposition of our being attorneys to his said majesty, until your honors make us such, and tell us what is our duty, what is our power, and what shall be our reward for said service." No action appears to have been taken on this memorial.

In May, 1730, an act was passed relating to attorneys, in which, among other things, it was enacted that in each county there should be one King's Attorney, who should plead and manage in the county where he was appointed, in all matters proper, in behalf of our sovereign lord the king; which attorneys should be appointed by the respective county courts. The attorney for the state continued to be appointed by the county court until the abolition of that court in 1855. In the Revised Statutes of 1821 we find his official term stated as two years, which so continues, subject to removal. In 1855 the power of appointment was vested in the judges of the Superior Court at their annual meetings.

In the following lists the names given after 1855 are from the official records: from 1785 to 1855 they have been taken from the Connecticut Register: before 1785 they have been taken from court records and other papers supposed to be trustworthy. It is not pretended that the lists are complete; doubtless a careful examination of the records in each county would render them more satisfactory, though it is not probable they could be made perfect, owing to the losses and imperfection of records.

 KING'S OR STATE'S ATTORNEYS, HARTFORD COUNTY.

Date of Appointment.	To.
April 3, 1705. RICHARD EDWARDS,	Ob. April, 1718
1719. PETER PRATT,	
Feb., 1727. JOHN BISSELL,	
June, 1728. PELETIAH MILLS,	
1730. JOSEPH GILBERT,	

Judges and Officers of the Superior Court.		
Date of Appointment.		To
Feb., 1731.	ROGER WOLCOTT, Jr.,	
June, 1755.	DANIEL EDWARDS,	
Nov., 1756.	THOMAS SEYMOUR,	Ob. March 18, 1767
April, 1767.	THOMAS SEYMOUR,	
April, 1777.	OLIVER ELLSWORTH,	
June, 1785.	JESSE ROOT,	
Nov., 1789.	JOHN TRUMBULL,	
	1795. THOMAS Y. SEYMOUR,	
	1807. CHAUNCEY GOODRICH,	
Dec., 1807.	JONATHAN BRACE,	May, 1809
	1809. ENOCH PERKINS,	
	1810. CHAUNCEY GOODRICH,	
	1811. ENOCH PERKINS,	
Aug., 1818.	HEZEKIAH HUNTINGTON,	Jan. 1822
	1822. ISAAC TOUCEY,	
	1835. HENRY A. MITCHELL,	
	1838. ISAAC PERKINS,	
	1840. THOMAS C. PERKINS,	
	1842. ISAAC TOUCEY,	
	1844. THOMAS C. PERKINS,	
	1846. RICHARD D. HUBBARD,	
	1854. HORACE CORNWALL,	
July 4, 1856.	RICHARD D. HUBBARD,	
July 4, 1868.	WILLIAM HAMERSLEY.	

KING'S OR STATE'S ATTORNEYS, NEW HAVEN COUNTY.

April 5, 1720.	WILLIAM ADAMS (still in office, 1730.)	
	ELIHU HALL, 1744-1759.	
	JARED INGERSOLL, 1757-1765.	
	JAMES A. HILLHOUSE, 1767-1775.	
	BENJAMIN DOUGLASS,	Ob. Dec. 1775
	1776. CHARLES CHAUNCEY,	
	1789. JONATHAN INGERSOLL,	
	1798. PIERPONT EDWARDS,	
	1805. JONATHAN INGERSOLL,	

 Judges and Officers of the Superior Court.

	Date of Appointment.	To.
June,	1811. DAVID DAGGETT,	
	1816. NATHAN SMITH,	
	1835. RALPH I. INGERSOLL,	
	1845. DENNIS KIMBERLEY,	
	1849. CHARLES A. INGERSOLL,	
	1853. JONATHAN STODDARD,	
	1854. ELEAZER K. FOSTER,	
July 4,	1877. ORVILLE H. PLATT,	
July 4,	1879. TILTON E. DOOLITTLE.	

 KING'S OR STATE'S ATTORNEYS, NEW LONDON
COUNTY.

	JOHN PARKER, 1706,	
	JAMES ROGERS, 1721,	
1727.	PETER PRATT,	Ob. Nov. 1730
	MATTHEW GRISWOLD, 1755-65,	
	SAMUEL HOLDEN PARSONS, 1774,	
	BENJAMIN HUNTINGTON, 1779-89,	
1789.	JOSHUA COIT,	
1796.	ASA SPALDING,	
1810.	CALVIN GODDARD,	
1815.	JAMES LANMAN,	
1821.	JACOB B. GURLEY,	
1833.	JIRAH ISHAM,	
1842.	JOHN T. WAIT,	
1844.	HENRY STRONG,	
1846.	JOHN T. WAIT,	
1854.	HIRAM WILLEY,	
July 4,	1861. DANIEL CHADWICK,	
July 4,	1875. THOMAS M. WALLER,	
July 4,	1883. JOHN M. THAYER.	

KING'S OR STATE'S ATTORNEYS, FAIRFIELD COUNTY.

THOMAS FITCH, 1727,
ROBERT WALKER, 1756,

 Judges and Officers of the Superior Court.

Date of Appointment.	To
	GOLD SELLECK SILLIMAN, 1769-74.
	JONATHAN STURGES, 1776.
	GOLD SELLECK SILLIMAN, Ob. July 21, 1790.
1790.	ANDREW ROWLAND,
1801.	ELISHA WHITTLESEY,
1803.	LEWIS B. STURGES,
1808.	SAMUEL B. SHERWOOD,
1818.	MATTHEW B. WHITTLESEY,
1822.	SIMEON H. MINER,
1837.	DAVID H. BELDEN,
1841.	HENRY DUTTON,
1842.	GEORGE A. DAVENPORT,
1843.	SILAS H. HICKOCK,
1845.	THOMAS B. BUTLER,
1846.	WILLIAM H. NOBLE,
1847.	JOSHUA B. FERRIS,
1850.	WILLIAM F. TAYLOR,
1851.	JOSHUA B. FERRIS,
1852.	WILLIAM F. TAYLOR,
1854.	JOSHUA B. FERRIS,
July 4, 1856.	ORRIS S. FERRY,
July 4, 1859.	JOSHUA B. FERRIS,
July 4, 1862.	JOSIAH M. CARTER,
July 4, 1868.	NELSON L. WHITE,
July 4, 1874.	JAMES H. OLNSTEAD,
July 4, 1880.	SAMUEL FESSENDEN.

 KING'S OR STATE'S ATTORNEYS, WINDHAM COUNTY.

1727. JOSEPH FOWLER,
 ELISHA PAINE, Jr., 1733-72,
 JEDEDIAH ELDERKIN, 1774-88.
 1788. HEZEKIAH BISSELL,
 1790. TIMOTHY LARRABEE,
 1804. JABEZ CLARK,
 1815. SYLVANUS BACKUS,
 1818. WILLIAM PERKINS,
 1820. ANDREW T. JUDSON,
 1833. CHAUNCEY F. CLEVELAND,

 Judges and Officers of the Superior Court.

Date of Appointment.		T.
	1835. JONATHAN A. WELCH,	
	1837. CHAUNCEY F. CLEVELAND,	
	1838. JONATHAN A. WELCH,	
	1842. GEORGE S. CATLIN,	
	1844. JONATHAN A. WELCH,	
	1846. ABIEL CONVERSE,	
	1847. JONATHAN A. WELCH,	
	1850. ABIEL CONVERSE,	
	1851. ELISHA CARPENTER,	
	1853. FREDERICK HOVEY,	
	1854. ELISHA CARPENTER,	
July 4, 1861.	GILBERT W. PHILLIPS,	
July 4, 1866.	EDWARD L. CUNDALL,	
July 4, 1872.	JOHN J. PENROSE.	

 KING'S OR STATE'S ATTORNEYS, LITCHFIELD
COUNTY.

	SAMUEL PETTIBONE, 1756-63,
	JOSHUA WHITNEY,
	REYNOLD MARVIN,
	ANDREW ADAMS, 1772-81,
	JOHN CANFIELD, 1786,
	TAPPING REEVE, 1788-94,
	1794. URIAH TRACY,
	1800. JOHN ALLEN,
	1806. NATHANIEL SMITH,
	1807. URIEL HOLMES,
	1184. ELISHA STERLING,
Sept.,	1820. SETH P. BEERS,
	1825. SAMUEL CHURCH,
	1833. LEMAN CHURCH,
	1840. DAVID C. SANFORD,
	1844. LEMAN CHURCH,
	1845. JOHN H. HUBBARD,
	1847. LEMAN CHURCH,
	1849. JOHN H. HUBBARD,
	1852. JULIUS B. HARRISON,

 Judges and Officers of the Superior Court.

Date of Appointm't.	To.
Sept., 1854.	GIDEON HALL,
July 4, 1856.	CHARLES F. SEDGWICK,
July 4, 1874.	JAMES H. HUNTINGTON,

STATE'S ATTORNEYS, MIDDLESEX COUNTY.

1785.	ASHER MILLER,
1794.	SAMUEL W. DANA,
1800.	JONATHAN MOSELY,
1805.	STEPHEN TITUS HOSMER,
1815.	MATTHEW T. RUSSELL,
1818.	MAJOR ANDRE ANDREWS,
1819.	GEORGE W. STANLEY,
1827.	SAMUEL INGHAM,
1835.	STILLMAN K. WIGHTMAN,
1839.	ELIPHALET A. BULKELEY,
1843.	SAMUEL INGHAM,
1844.	CHARLES C. TYLER,
1847.	CHARLES WHITTLESEY,
1853.	WALDO P. VINAL,
July 4, 1857.	MOSES CULVER,
July 4, 1863.	WILLIAM T. ELMER,
July 4, 1875.	WILLIAM F. WILCOX,
July 4, 1884.	WILLIAM T. ELMER,

STATE'S ATTORNEYS, TOLLAND COUNTY.

1786.	SYLVESTER GILBERT,
1807.	JONATHAN BARNES,
1830.	JOHN FITCH,
1836.	RHODOLPHUS WOODWORTH,
1838.	LOREN P. WALDO,
1849.	JOHN H. BROCKWAY,
July 4, 1867.	DWIGHT MARCY,
July 4, 1869.	BENEZET H. BILL.

Judges and Officers of the Superior Court.

SHERIFFS.

AN executive officer for the courts was of course necessary from the beginning, but he is first mentioned in our records by the title of Marshal, under date of January 10, 1649-50. The earliest law for appointing county marshals appears in the revision of our statutes printed in 1673, and gave that power to the county courts.

During the interruption of the colony government by Sir EDMUND ANDROS, 1687-9, a sheriff for each of the four counties was appointed by the governor and council, but on the reassumption of the charter the former order prevailed.

At the May session of the General Court in 1698, it was ordered and enacted, that the marshal of the colony should be called the High Sheriff, and the county marshal in like manner the County Sheriff. The powers of the sheriff were enlarged by an act passed in May, 1724, and the appointment was vested in the governor and council. As, unfortunately, considerable portions of the council-journal are missing, the exact time of the appointment to office of a number of sheriffs cannot be given. In the following lists, where the month and day are not stated, the date must be regarded as an approximation.

The constitution of 1818 provided for the appointment by the General Assembly of a sheriff in each county, to hold his office for three years, removable by said Assembly. By a constitutional amendment adopted in 1838, a sheriff for each county was to be chosen by the electors residing therein, the term remaining as before. In consequence of this amendment, in May, 1839, the Assembly removed from office those sheriffs who had not been elected.

The sheriff of the county within which the legislature held its session was formerly the officer or messenger of the Upper House or Senate, (as the constables of the town were officers or attendants of the House of Representatives), and his stated fees for attendance as such still appear in the General Statutes of 1875. The first instance of another than the sheriff being chosen as messenger of the senate was in 1843, and the sheriff was not elected messenger in 1844, 1853, 1855, 1857, 1858, 1860, 1862, nor since, although the sheriff of Hartford County was appointed assistant messenger in 1865. The attendance of the sheriff on

Judges and Officers of the Superior Court.

the General Assembly is now limited to making proclamation before the final adjournment of the session.

Formerly, and within the memory of some now living, the sheriff, while in the execution of his official duty, wore a sword, and at all public processions he was the marshal.

On the 28th of November, 1776, the governor and council appointed JONATHAN FITCH, Esq., of Westmoreland, in the county of Westmoreland, to be sheriff of said county. He held that office until by the decree of Trenton, December 30th, 1782, it was decided that the jurisdiction of that territory, claimed by the State of Connecticut, of right belonged to the State of Pennsylvania.

COLONY MARSHALS AND SHERIFFS.

Date of Appointment.		To
April 5, 1638.	THOMAS STANTON,	
April 9, 1646.	JONATHAN GILBERT, vice STANTON,	
May 11, 1676.	GEORGE GRAVE, vice GILBERT removed.	
	On the resumption of the charter government after its interruption by Sir E. Andros, GRAVE was reappointed May 9, 1689,	Ob. Dec. 3, 1692
Feb. 21, 1693.	WILLIAM WHITING,	
May 8, 1701.	ICHABOD WELLS, vice WHITING,	1708
	No successor was appointed.	

SHERIFFS, HARTFORD COUNTY.

BEFORE 1687, it would seem that the courts in Hartford made use of the Colony Marshal, as they had done before the division of the colony into counties.

Date of Appointment.		To
Nov. 2, 1687.	PHINEAS WILSON, appointed by Sir E. Andros and Council,	May 9, 1689
	1689. GEORGE GRAVE,	Ob. Dec. 3, 1692
Dec. 7, 1692.	GEORGE GRAVE, jun.,	
	1693. WILLIAM WHITING,	

 Judges and Officers of the Superior Court.

Date of Appointm't.	To.
March 4, 1697.	ICHABOD WELLS, vice WHITING,
Sept. 7, 1708.	SAMUEL WEBSTER,
Aug. 1, 1721.	WILLIAM WHITING, vice Webster, resigned.
June 1. 1724.	JOSEPH PITKIN,
Sept. 14, 1726.	JOSEPH BACKUS, vice PITKIN, resigned,
	1736. SAMUEL TALCOTT,
	1749. WILLIAM PITKIN.
Feb. 2, 1767.	EZEKIEL WILLIAMS, vice PITKIN, promoted,
Jan. 19, 1789.	STEPHEN CHESTER, vice WILLIAMS, resigned,
June 1, 1819.	NOAH A. PHELPS,
June 1, 1828.	JEREMY HOADLEY,
June 1, 1834.	WILLIAM MATHER, jun.
June 7, 1837.	ANSEL HUMPHREY, removed by General As- sembly May, 1839,
June 1, 1839.	GILBERT ALLEN,
June 1, 1842.	CHESTER ADAMS,
June 1, 1851.	NATHAN M. WATERMAN,
June 1, 1854.	SIMON B. KENDALL,
June 1, 1857.	LUCIUS G. GOODRICH,
June 1, 1863.	WESTELL RUSSELL,
June 1, 1875.	OLIVER D. SEYMOUR,
June 1, 1881.	ALVA W. SPAULDING.

 MARSHALS OF THE NEW HAVEN COLONY OR
JURISDICTION.

Oct. 25, 1639.	ROBERT SEELEY,
Nov. 7, 1642.	THOMAS KIMBERLEY,
May 28, 1662.	ABRAHAM DOOLITTLE, to the end of that gov- ernment.

 SHERIFFS, NEW HAVEN COUNTY.

Nov. 13, 1667.	JOHN ALLING,	
June 9, 1675.	SAMUEL MILES,	Ob. Dec. 24, 1678
June, 1679.	JOHN COOPER,	
Nov. 2, 1687.	JOHN HUDSON, appointed by Sir E. An- dros and Council,	May 9, 1689
1689.	JOSHUA HOTCHKISS,	

 Judges and Officers of the Superior Court.

Date of Appointment.	To.
Oct. 11, 1722.	JOHN TROWBRIDGE, also appointed by Governor and Council, June 1, 1724,
1729.	MOSES MANSFIELD,
1758.	JONATHAN FITCH,
October, 1793.	JOHN BRAINERD, vice FITCH, deceased,
Nov. 3, 1804.	NATHANIEL ROSSITER, vice BRAINERD, removed,
June 1. 1819.	CHARLES H. POND,
June 1, 1834.	ERASTUS OSBORN,
June 2, 1837.	SAMUEL COOK, removed by General Assembly, May, 1839,
June 1, 1839.	CHARLES W. CURTIS, elected by the freemen,
June 1, 1842.	NORRIS WILLCOX,
June 1, 1845.	LEANDER PARMELEE,
June 1, 1857.	DAVID S. FOWLER,
June 1, 1863.	GIDEON O. HOTCHKISS,
Oct. 2, 1871.	CHARLES S. SCOTT, vice HOTCHKISS, deceased.
June 1, 1875.	JOHN C. BYXBEE,
June 1, 1884.	ROBERT O. GATES.

SHERIFFS, NEW LONDON COUNTY.

Sept. 21, 1668.	THOMAS MERRITT,
Oct. 8, 1674.	SAMUEL STARR, appointed by the General Court,
Sept. 19, 1582.	STEPHEN MERRICK; vice STARR, resigned,
Dec. 5. 1683.	SAMUEL STARR, vice MERRICK,
Nov. 2, 1687.	RICHARD EDGECOMB, appointed by Sir E. Andros and Council, May 9, 1689
June 4, 1689.	SAMUEL FOSDICK,
Aug. 5, 1690.	JOHN PLUMB, jun.,
March 3, 169½.	WILLIAM HALSEY (spelled HORSEY on the record.),
Sept. 20, 1698.	JOHN PRENTICE, vice HALSEY, removed,
Nov. 24, 1713.	BENJAMIN STARR,
June 1, 1724.	RICHARD CHRISTOPHERS, jun.,
1735.	DANIEL HUBBARD,
1737.	GEORGE RICHARDS,
1745.	BENJAMIN STARR, Ob. Aug. 23, 1753

Judges and Officers of the Superior Court.

Date of Appointm't.	To.
1753.	CHRISTOPHER CHRISTOPHERS, Ob. Oct. 25, 1775
1775.	PROSPER WETMORE,
Oct. 18, 1788.	JEDEDIAH HUNTINGTON,
May 19, 1789.	JOSHUA HUNTINGTON, vice JEDEDIAH HUNTINGTON, resigned,
June 1, 1819.	SIMON SMITH,
June 1, 1884.	DAVID BALDWIN.
June 4, 1836.	ALEXANDER STEWART, vice BALDWIN, removed,
June 1, 1845.	GEORGE BLISS,
Sept. 24, 1857,	NEHEMIAH B. PAYNE, appointed by Governor, vice BLISS, deceased,
June 1, 1860.	RICHARD A. WHEELER,
June 1, 1872.	ORLANDO N. RAYMOND,
June 1, 1878.	NATHAN D. BATES,
June 1, 1881.	FRANK HAWKINS.

SHERIFFS, FAIRFIELD COUNTY.

1674.	SAMUEL MOREHOUSE,
Nov. 2, 1687.	WILLIAM SYDENHAM, appointed by Sir E. Andros and Council, May 9, 1689
1689.	SAMUEL ROBERTSON,
1692.	SAMUEL SQUIRE,
1702.	JOSEPH PHIPPEN,
1711.	BENJAMIN FAYERWEATHER,
1717.	JONATHAN STURGIS, also appointed by Governor and Council, June 1, 1724
June 1, 1726.	ANDREW BURR, vice STURGIS, resigned,
May 13, 1727.	THOMAS HANFORD, vice BURR, resigned,
1728.	EBENEZER DIMON,
1734.	THOMAS HILL,
1763.	HEZEKIAH FITCH,
Aug. 15, 1771.	THADDEUS BURR, vice FITCH, resigned,
1777.	ELIJAH ABELL,
Oct. 20, 1806.	EBENEZER DIMON,
June 1, 1819.	FRIEND STARR,
June 1, 1831.	ABRAHAM D. BALDWIN,

 Judges and Officers of the Superior Court.

Date of Appointm't.	To.
June 6, 1837.	SAMUEL BEARDSLEY, removed by General Assembly, May, 1839,
June 1, 1839.	STARR FERRY, elected by the freemen,
June 1, 1842.	SAMUEL RAYMOND,
June 1, 1845.	CHARLES ISAACS,
June 1, 1851.	PHILO F. BARNUM,
June 1, 1854.	PHILO W. JONES,
June 1, 1857.	JACOB A. VAN ZANDT,
June 1, 1860.	THOMAS SANFORD,
June 1, 1863.	MATTHEW BULKELEY,
June 1, 1869.	EDWARD A. LEEDS,
June 1, 1875.	GEORGE W. LEWIS,
June 1, 1878.	AARON SANFORD,
June 1, 1881.	CHARLES H. CROSBY,
June 1, 1884.	CHRISTIAN SWARTZ.

SHERIFFS, WINDHAM COUNTY.

May 27, 1726.	JABEZ HUNTINGTON,	Ob. Sept. 26, 1752
	1752. ELEAZER FITCH, vice HUNTINGTON, deceased,	
Dec. 27, 1776.	JABEZ HUNTINGTON, vice FITCH, removed.	
		Ob. Nov. 24, 1782
Dec. 2, 1782.	SHUBAEL ABBE, vice HUNTINGTON, deceased,	
		Ob. April 16; 1804
May 15, 1804.	HENRY WEBB,	
June 1, 1819.	EDMUND FREEMAN,	
June 1, 1825.	DAVID KEYES,	
June 1, 1831.	ROGER COIT,	
June 1, 1837.	HEZEKIAH OLNEY, removed by General Assembly,	May, 1839
June 1, 1839.	JOHN GALLUP, 3d, elected by the freemen,	
June 1, 1845.	SEPTIMUS DAVISON,	
June 1, 1848.	GEORGE WARREN,	
June 1, 1854.	DANFORTH CHILD,	
Aug. 14, 1855.	FREDERICK P. COE, appointed by Governor, vice CHILD, deceased,	
June, 1856.	DAVID GREENSLIT, appointed by General Assembly to fill unexpired term.	

 Judges and Officers of the Superior Court.

Date of Appointment.	To
June 1, 1868.	PRESCOTT MAY,
Nov. 14, 1870.	CALVIN H. DAVISON, appointed by Governor, vice MAY, deceased,
June, 1871.	CHARLES H. OSGOOD, appointed by General Assembly to fill unexpired term.

SHERIFFS, LITCHFIELD COUNTY.

Nov. 14, 1751.	OLIVER WOLCOTT,
Oct. 30, 1771.	LYNDE LORD, vice WOLCOTT, resigned,
July 8, 1801.	DAVID SMITH,
Oct. 16, 1801.	JOHN R. LANDON, vice SMITH, resigned,
June 1, 1819.	MOSES SEYMOUR, jun.,
June 1, 1825.	OZIAS SEYMOUR,
June 1, 1834.	ALBERT SEDGWICK,
June, 1835.	CHARLES A. JUDSON, vice SEDGWICK, removed.
June 1, 1838.	ALBERT SEDGWICK,
June 1, 1854.	LEVERETT W. WESSELLS,
June 1, 1866.	HENRY A. BOTSFORD,
June 1, 1869.	GEORGE H. BALDWIN,
June 1, 1878.	JOHN D. YALE,
June 1, 1881.	CHARLES J. PORTER,
June 1, 1884.	HENRY J. ALLEN.

SHERIFFS, MIDDLESEX COUNTY.

June 3, 1785.	WILLIAM WALTER PARSONS,
Oct. 22, 1790.	ENOCH PARSONS, vice W. W. PARSONS, resigned,
May 29, 1818.	JOHN L. LEWIS, vice PARSONS, resigned,
June 1, 1827.	GIDEON HIGGINS,
June 1, 1830.	LINUS COE,
June 1, 1842.	CHARLES ARNOLD,
June 1, 1848.	CHARLES STEVENS,
June 1, 1851.	CURTIS BACON,
June 1, 1854.	HARRIS R. BURR,
June 1, 1860.	CHARLES W. SNOW,
June 1, 1866.	JOHN I. HUTCHINSON,

 Judges and Officers of the Superior Court.

Date of Appointm't.	To
June 1, 1872.	ARBA HYDE,
June 1, 1875.	GEORGE N. LEWIS,
Sept. 3, 1876.	TIMOTHY RANNEY, appointed by Governor, vice LEWIS, deceased,
March 22, 1877.	JOHN I. HUTCHINSON, appointed by General Assembly to fill unexpired term of LEWIS. Elected by the freemen 1878.

 SHERIFFS, TOLLAND COUNTY.

June 8, 1786.	ELIJAH CHAPMAN,
Oct. 26, 1809.	GEORGE OLIVER GILBERT, vice CHAPMAN, re- signed.
June 3, 1819.	ELIJAH JOHNSON,
June 1, 1828.	HIRAM RIDER,
June 3, 1837.	CARLOS CHAPMAN, removed by General Assem- bly, May, 1839,
June 1, 1839.	SIMON HOUSE, elected by the freemen,
June 1, 1842.	NOVATUS CHAPMAN,
June 1, 1845.	SOLOMON L. GRIGGS,
June 1, 1851.	WILLIAM T. COGGSWELL,
June 1, 1854.	JASPER H. BOLTON,
June 1, 1857.	WILLIAM A. FOSTER,
June 1, 1863.	AMOS PEASE,
June 1, 1869.	GEORGE M. PAULK,
June 1, 1878.	LORENZO G. WINTER,
June 1, 1881.	WILLIAM M. CORBIN,
June 1, 1884.	ORREN C. WEST.

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APPEAL.

Where an appeal is authorized "when the matter in demand exceeds the sum of five hundred dollars stated in the writ," a suit brought to recover possession of real estate and five hundred dollars damages does not become appealable by reason of the value of the demanded premises. *Burke v. Grace*, 518.

ATTACHED PROPERTY (BOND FOR.)

See BOND FOR ATTACHED PROPERTY.

ATTACHMENT.

See FOREIGN ATTACHMENT, 2.

ATTORNEY AT LAW.

Instructions by a grantor to an attorney drawing a deed are not ordinarily privileged communications. If the grantor had instructed the attorney to make the conveyance to the grantee in trust, it would be competent for the attorney to testify that such were the instructions. *Todd v. Munson*, 580.

AUDITORS AND COMMITTEES.

1. The report of a committee in a suit for an account ought not to be rejected or set aside if it presents all the facts required to enable the court to settle on an equitable basis the accounts between the parties. *Patterson v. Kellogg*, 38.
2. Under the rule of court, that where a case, referred to an auditor or committee, runs from term to term by continuance, such auditor or committee "will be re-appointed without a formal motion by either party, and the clerk may make the necessary entries therefor without any special order of the court," the omission of the clerk to make the entry on his docket does not affect the case. The re-appointment is made by the law, and the clerk's omission is only a clerical one, that can be corrected at any time afterwards. *Shaler & Hall Quarry Co. v. Campbell*, 327.
3. But a re-appointment is not necessary. The case stands referred to such auditor or committee until the appointment is directly or impliedly revoked by the court. *Id.*
4. Questions of adjournment, before auditors and committees, are, as in courts, a matter of discretion; and in the absence of conduct that indicates corruption or fraud, or a prejudice or unfairness that are equivalent to fraud, their action in the matter is final and cannot be reviewed. *Id.*

BALLOT.

See ELECTION, 1.

BASTARDY SUIT.

1. A proceeding under the bastardy act (Gen. Statutes, p. 469, secs. 1, 4, (617))

is in form criminal but in its nature civil. *Town of Naugatuck v. Smith*, 523.

2. The justice of the peace before whom the case is primarily brought can only bind the defendant over to the higher court, which court can acquire jurisdiction only by this proceeding. *Ib.*
3. If a plea in abatement is filed before the justice there is no appeal by the defendant from an adverse decision upon it; but the practice is to allow him to renew his objection in the higher court. *Ib.*
4. The statute provides that on a binding over the justice shall commit the defendant on his failure to give bond for his appearance before the higher court, but this is wholly for the security of the plaintiff and the failure of the justice to commit does not invalidate the binding over. *Ib.*
5. In the higher court the presence of the defendant is not necessary to its jurisdiction, but the case may be heard and decided in his absence. *Ib.*

BILLS.

See NOTES AND BILLS.

BOND FOR PROPERTY ATTACHED.

An action for the conversion of personal property was brought four months after the conversion and the converted property attached in the suit. Afterwards a statutory bond was substituted for the attachment, by which the obligors bound themselves that, if the defendant did not pay the judgment that should be recovered, the obligors would pay the value of the property at the time of the attachment, not exceeding the amount of the bond. Afterwards a part of the property was returned by the defendant. In the suit the facts were found by a committee, who reported the value, at the time of its conversion, of the property not returned, and the amount of damage done to the property returned, and judgment was rendered for those sums. In a suit afterwards brought on the bond, to recover the value of the property not returned, it was held that the report of the committee in the original suit was not admissible against the obligors, except for the purpose of showing the fact of the judgment; not being admissible for the purpose of showing the value of the property at the time of the attachment—(1st) because it found the value at the time of the conversion only, which was four months before the attachment, and (2d) because the defendants were not parties to that suit and it was therefore *res inter alios acta*. *Trubee v. Wheeler*, 458.

BURDEN OF PROOF.

See EVIDENCE, 1.

CEMETERY ASSOCIATION.

1. The burial of the dead being a necessity, land may be taken for the purpose under the authority of the state. *Evergreen Cemetery Association v. Beecher*, 551.
2. And land taken for such a purpose by a corporation authorized to establish and conduct a cemetery, is taken for public use, if all the public have a right of burial there, even though the expense may operate practically to exclude some. *Ib.*
3. But a corporation does not take land for a public use where the public have not, and can not acquire, the right to bury in it. *Ib.*

CHARITABLE BEQUEST.

See WILL, 12, 16.

CHARGE TO JURY.

See EVIDENCE, 2.

COMMITTEE IN CHANCERY.

See AUDITORS AND COMMITTEES.

CONSERVATOR.

1. A conservator acts independently of his ward, and in all his transactions is alone the responsible party. Neither a conservator nor a guardian can bind the ward or his estate by his contracts. *Brown v. Eggleston*, 111.

2. But a conservator is not liable for debts incurred by the ward before his appointment. Such claims remain claims against the ward alone. *Ib.*

CONTRACT (CONSTRUCTION OF.)

1. *M* owned two patents for a mechanical contrivance for steering propellers, and the plaintiff a patent for a device for the same purpose that could be used advantageously with that of *M*, and they agreed that the plaintiff's patent should be assigned to *M*, who should go to England and make an effort to sell the three together, for such price as he should think best, and if they were not sold within one year that *M* should re-assign the plaintiff's patent to him, the plaintiff to be saved from all expense in the matter. If the patents were sold *M* was to pay the plaintiff \$8,000; if either or all should be sold for more than \$80,000 the plaintiff was to be paid ten per cent on the excess above that sum until the sales reached \$150,000, when he was to receive no further percentage. The plaintiff made no warranty of the validity or salability of his patent, and *M* required none. *M* at once went to England and made every reasonable effort to sell the patents together, but it was there discovered, what none of the parties had before suspected, that an English patent older than the plaintiff's, involving nearly the same improvement, rendered his patent wholly unsalable. *M*, finding it impossible to sell the three patents together, sold his own patents for about \$4,000 in cash and certain stock, of the nominal value of £12,000, but which proved to be of no real value; and within the time limited by the contract he tendered to the plaintiff a re-assignment of his patent, which the latter refused to receive. In a suit on a bond given for the faithful performance of the contract by *M*, it was held that the plaintiff was entitled to recover \$8,000, with interest from the time of the sale of his patents by *M*. *Fowler v. Mallory*, 420.

2. Although *M* had received but about \$4,000 for his patents, the plaintiff was held to be entitled to the \$8,000, as being the lowest sum which by the contract he was to receive. *Ib.*

CONVICTION.

1. A person is "convicted" of a crime, according to the ordinary use of that term, when he has been found guilty by a jury or has pleaded guilty, although there has been no sentence or judgment by the court. *Quintard v. Knoedler*, 485.

2. And the word is used in this sense in the act of 1882 (Session Laws 1882, ch. 107, part 4, sec. 2), which provides for a suit on the bond given by a person licensed to sell liquor, whenever such person has been convicted of a violation of the statute. *Ib.*

COPYRIGHT.

See OPINIONS OF SUPREME COURT, 1, 2, 3.

DAMAGES (HEARING IN.)

See **HEARING IN DAMAGES.**

DEMURRER.

Upon a hearing in damages upon a demurrer overruled, in a suit for an injury by the defendant's negligence, the admission of the demurrer exhausts itself in conclusively establishing the defendant's liability for some damages and casting upon him the burden of proof as to the absence of negligence. He does not go into this inquiry weighted with the admission, and is not under the necessity of proving his case by more than a preponderance of evidence. *Crogan v. Schiele*, 186; *Nolan v. N. York, N. Haven & Hartford R. R. Co.*, 462.

See **HIGHWAY**, 8.

DISCONTINUANCE OF PROCEEDINGS TO TAKE PROPERTY UNDER EMINENT DOMAIN.

See **PROPERTY TAKEN UNDER EMINENT DOMAIN.**

DOMICILE.

See **ELECTORS, (ADMISSION OF), 2.**

DOWER.

1. A setting out of dower conveys no title. The right to dower already exists and rests upon the whole real estate. The assignment of it merely designates a particular portion to which it shall be confined. *Hewitt's Appeal from Probate*, 24.

See **PROBATE COURT**, 2.

ELECTION TO OFFICE.

A city charter provided that the common council in joint convention should appoint a prosecuting attorney, but gave no direction as to the mode of appointment, and the convention had no power of removal. The convention met for the purpose of making the appointment and voted "to proceed to ballot for a prosecuting attorney." A ballot was taken and the relator had a clear majority of all the votes cast and of the whole convention, and the result was announced by the presiding officer. A member then offered a resolution declaring the relator elected. This resolution was lost. Two resolutions were then offered, one declaring the ballot taken void by reason of errors in it (which it was found did not exist,) and the other declaring the defendant "elected and appointed prosecuting attorney;" both of which resolutions were passed. Held that the convention by its ballot had elected the relator, that no resolution declaring him elected was necessary, and that the later resolutions declaring the ballot void and the defendant elected were of no effect. *State ex rel. Coogan v. Barbour*, 76.

ELECTORS (ADMISSION OF.)

1. The selectmen and town clerk are by the constitution of the state (art. 6, sec. 5,) a board of registration in each town to decide on the qualifications and admission of electors in such town. Held that they are quasi judicial officers, and exempt from liability for their action so long as they act in good faith and within their jurisdiction. *Perry v. Reynolds*, 527.
2. A man twenty-five years of age, whose parents lived in another state, and who had left his home with them with no intention of returning and was not aided by them in his support, had resided for more than a year in New Haven as a student in a theological school, a part of the time

teaching and preaching there and in the vicinity, and intending to make that the place of his residence until he had completed his studies and obtained employment elsewhere. Held to be domiciled in New Haven and entitled to admission as an elector there. *Ib.*

EQUITY.

A court of chancery has authority to protect remainder interests in property, and this authority is not affected by the statute (Gen. Statutes, p. 371, sec. 18,) which gives courts of probate power to require security in such cases. *Security Company v. Hardenburgh*, 169.

ERROR.

While the omission to demur to defects appearing on the face of the pleadings may be regarded as a waiver of the objection, yet this court reserves the right, in cases brought before it for review, to consider questions not thus raised, if the objections are of such a character as to nullify the proceedings and render the judgment liable to be set aside on a writ of error. *Donaghue v. Gaffy*, 43.

ESTATE IN SETTLEMENT.

See **SET-OFF**, 1, 2.

EVIDENCE.

1. The term "burden of proof" is properly used only with reference to a party who is burdened with the necessity of proving some affirmative fact essential to the support of his case. The burden of proof, in this sense, never shifts from side to side during the trial. The necessity of supplying prevailing evidence shifts from one side to the other as the evidence on one side or the other predominates; but this is a matter of sufficiency of proof, not of the burden of proof. *Pease v. Cole*, 53.
2. Where the questions of fact are fairly submitted to the jury in regard to a matter wholly within their province, the court is not bound to comment on the bearing and weight of the evidence. *Cohen v. Pemberton*, 222.
3. The declarations of a party in favor of his own title, are not admissible except where they are a part of the *res gestæ*. *Saugatuck Cong. Society v. East Saugatuck Sch. District*, 478.
4. And the mere absence of such declarations can not be shown by the adverse party against him. *Ib.*
5. Upon a trial for an assault on *A* with intent to murder, in which the defense was that *B* and not the prisoner made the assault, evidence of threats of *B* against *A* was held inadmissible. *State v. Beaudet*, 536.
6. The act of 1885 (Session Laws 1885, ch. 102,) provides that evidence objected to shall not be received subject to the objection, unless both parties consent. Held not to apply to evidence received provisionally, with reference to further evidence which counsel propose to supply. *Dougherty v. Welch*, 558.
7. On the trial of an action on the warranty of a horse, the plaintiff, who testified in his own behalf, was asked on cross-examination by the defendant's counsel how many other purchases of horses he had made in the last twenty years and tried to set aside on the ground that he had discovered defects in them. Held to be inadmissible, as raising an outside and irrelevant issue. *Russell v. Cruttenden*, 564.
8. And held not admissible as going to show that the plaintiff was not an expert on the subject of the diseases and vices of horses. *Ib.*

9. Nor for the purpose of showing that the plaintiff was given to imagining that horses he had purchased had defects. This fact, if established, would not tend to show that the particular horse that was the subject of the present controversy was free from defects. *Ib.*

See BOND FOR ATTACHED PROPERTY, 1; DEMURRER, 1.

EXECUTORS AND ADMINISTRATORS.

1. The act of 1882 (Session Laws 1882, p. 146), provides that whenever any person shall have a legal claim against any executor, administrator, guardian or trustee, for moneys paid or services rendered for the estate in the hands of such executor, &c., which ought equitably to be paid from such estate, the amount may be recovered in an action against such executor, &c., the judgment to be paid wholly out of such estate. Certain expenses were incurred by the plaintiff in a contest over two wills of a decedent that were presented for probate, both of which were disallowed, and administrators appointed on the estate. Held that the expenses thus incurred did not constitute a legal claim against the estate and therefore did not fall within the statute. *Brown v. Eggleston*, 110.
2. And held that it made no difference that the expenses were incurred at the request of a person who was afterwards appointed one of the administrators, and who after appointment promised to pay them. *Ib.*
3. And that it would have made no difference if the request had been made after the appointment, as the estate would not be liable under the statute unless the expenses were incurred for the estate and were such as ought equitably to be paid out of the estate. *Ib.*
4. The only remedy in that case would have been against the administrator at whose request the expenses had been incurred, who would be personally liable on general principles. *Ib.*
5. The statute was not intended to affect the relation of an executor or administrator to the party rendering services or paying money for the estate, but only to give the latter a right of action against the estate as a cumulative remedy. *Ib.*
6. Expenses incurred by an administrator before his appointment can be allowed by the probate court, where they are reasonable and have been incurred in behalf of the estate. *Ib.*
7. Where an administrator sues upon a claim that has accrued in his favor after the death of the intestate, the designation of himself in the writ as administrator is mere description, and not necessary. The claim, though due to him in his official character, is yet one that never existed in favor of the intestate, and so is not held by him in his representative character. *Harris v. Taylor*, 500.

See SET-OFF, 1, 2.

FALSE REPRESENTATIONS.

1. The plaintiff alleged in his complaint that as a sub-contractor in the construction of a building for the defendant, he had an inchoate lien on the property for his claim and was about to take proceedings to perfect it, when the defendant, for the purpose of preventing his doing so, falsely represented to him that she had paid the original contractor in full and that nothing was due him; and that the plaintiff, believing the representation, did not perfect his lien and thereby lost it; claiming damages for the false representation. Held, on a demurrer to the

complaint, that it presented a good cause of action. *Alexander v. Church*, 561.

2. And held not to affect the case that it did not appear that the original contractor was irresponsible, nor that a demand had been made on him for payment. The plaintiff was entitled to his lien as security without reference to his remedy against the original contractor. *Ib.*

FOREIGN ATTACHMENT.

1. The defendants, residing in the state of Indiana and owning stock in a bank located there, lodged a certificate of the stock, with a blank power to sell and transfer it, with a corporation in this state as collateral security for a loan, its value being considerably in excess of the loan. Held that their equitable interest in the stock could not be reached by the process of foreign attachment in this state. *Winslow v. Fletcher*, 390.
2. And that the stock could not be reached by ordinary attachment here. *Ib.*
3. A debt owed by a school district may be taken by foreign attachment. *Seymour v. Over-River School District*, 502.
4. A school teacher's salary was \$1,200 a year, but there was no express contract as to the time of payment. It was found however that it was the understanding of the parties that it should be paid in ten monthly payments of \$120 each, at the close of each month of the school year of ten months, and that such had been the practice. Held that the salary was thus apportionable; also that when the last school day of a month had passed, the salary for the month was earned, and could be taken by foreign attachment, although the month had not expired. *Ib.*

FRAUD.

1. Where a person stands in a relation of special confidence towards another and has with him some transaction from which he derives benefit, such transaction will not be sustained in equity unless it was fair in itself and its nature and effect fully understood. *Nichols v. McCarthy*, 299.
2. And the burden of proof is on the person claiming the benefit of the transaction to show these facts. *Ib.*
3. Where a debtor understandingly and deliberately conveys away his property to hinder or defraud his creditors, a court of equity will not lend him its aid to recover it back. *Ib.*
4. But whether a party guilty of an independent fraud in receiving or retaining property upon such a conveyance should be allowed to avail himself of the fact that the conveyance to him was made to defraud creditors, as a defense against a suit to recover the property back: *Quære*. The court inclined to the opinion that such a qualification of the rule would be reasonable. *Ib.*
5. Where an old man, in feeble health, and in great agitation of mind over a suit threatened by his wife, with whom he had a controversy, and over her incurring debts in his name, and in fear that he was going to lose his property, conveyed away his property, but it was not found that he did so to evade the claims of his wife and creditors, it was held that his act was not to be regarded as done with such an in-

tent to evade his debts that a court of equity ought to refuse its aid to recover the property back. *Ib.*

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See FRAUD, 3, 4, 5.

GUARANTEE.

See NOTES AND BILLS, 2, 3.

HEARING IN DAMAGES.

See DEMURRER, 1; HIGHWAY, 8; JURY TRIAL, 1.

HIGHWAY.

1. In an action against a city for an injury from a defective sidewalk, the question was where the line of the street ran along an open space in front of a store. The street had been an ancient town highway, but had never been formally laid out, so far as the records showed. Held that the line of the street as marked by a line of occupancy of the land above and below the place in question, might be shown, as evidence of the line at the place in question. *Seeley v. City of Bridgeport*, 1.
2. And held that the evidence need not be limited to the next occupancy on each side, but that evidence of the line of occupancy still further off, though of less weight, was yet admissible; there being a presumption that if the street had been formally laid out it would have been laid out along continuous lines, and that if it became a street by dedication and public use, such dedication and use were presumably along such continuous lines. *Ib.*
3. Where the owner of a building near a street line throws open the intervening space to public use, and by paving it like the adjacent sidewalk invites the public to use it as a part of the sidewalk, he is bound to keep the space so offered for public use free from dangers. *Crogan v. Schiele*, 186.
4. Where a cause of danger to public travel exists on private land adjoining a public highway, the liability of the owner of the land for an injury from it depends on its dangerous character with reference to public travel rather than its exact location. *Ib.*
5. The question whether it endangers public travel is, as a general rule, one of fact and not of law. *Ib.*
6. The act of 1883 (Sessions Laws 1883, p. 283) provides that the notice to be given to the selectmen of a town by any person injured by means of a defect in a highway, shall state the nature of the injury. A notice of an injury to a horse, carriage and harness, stated it as follows: "Said horse was injured in the left leg and knee joint and otherwise bruised and injured; said carriage was injured by breaking the right shaft and being wrenched and sprung; and said harness was much broken." Held to be sufficient. *Brown v. Town of Southbury*, 212.
7. The act requires the place of the injury to be stated in the notice. The place was described as "a defective sluice across the highway between the dwelling house of E. B. and the J. H. place, so called." There were between those points three sluice ways, within twenty-five rods, of which the middle one only was defective. Held that the notice was sufficient. *Ib.*

8. The plaintiff alleged the notice in his complaint, and the defendant demurred and the case was heard in damages. Held not necessary for the plaintiff to prove the notice. Whether the defendant could have shown the want of notice in fact for the purpose of affecting the question of damages: *Quære. Ib.*

9. An alteration of a public street in a borough was laid out by the authorities of the borough, and an appeal was taken by one of the land owners for a re-assessment of his damages. While this appeal was pending the borough voted to accept the lay-out of the alteration. Held that its action was not invalidated by the pendency of the appeal, and that by its acceptance the alteration became legally established. *Messer v. Wildman, 494.*

See NEGLIGENCE, 1, 2, 3.

HUSBAND AND WIFE.

A husband, without the knowledge of his wife, submitted to arbitration a question as to a boundary line of her land. Held that she could not be affected by the award. *Benedict v. Pearce, 496.*

INHABITANT.

See SETTLEMENT.

INTOXICATING LIQUORS.

The act of 1882 (Session Laws of 1882, p. 186), provides that if any licensed person "shall sell or deliver any intoxicating liquor to a minor," he shall be fined, &c. Held that a delivery to a minor sent by his father to purchase liquor for him, did not come within the act. *State v. McMahon, 407.*

See CONVICTION, 2.

JUDGE.

1. The act of 1885 (Session Laws of 1885, ch. 7,) which authorizes a judge, after his term of office has expired, to make a finding of facts in an appealed case that had been heard and determined by him, is valid. *Johnson v. Higgins, 236.*

2. Whether he would not have had the power without that statute, under the act of 1882 (Session Laws of 1882, ch. 50,) which gives parties the right to appeal and makes such a finding necessary on the appeal:—*Quære. Ib.*

JURISDICTION.

The District Court of Waterbury in New Haven County has by statute jurisdiction in all cases in law and equity in which either party resides in certain of the neighboring towns in Litchfield County. Held that the jurisdiction of the court extended to actions to recover possession of lands in such towns. *Burke v. Grace, 513.*

JURY TRIAL.

Under the provision of the state constitution that "the right of trial by jury shall remain inviolate," it is not necessary that a hearing in damages upon a default in an action for a tort should be before a jury, the practice of assessing such damages by the court having been long established at the time of the adoption of the constitution. *Seeley v. City of Bridgeport, 1.*

LAPSED LEGACY.

See WILL, 11.

LEGACY.

See WILL.

LIBEL.

1. The defendant published of the plaintiffs, who were a firm of wholesale liquor dealers, the following:—"To the Liquor Dealers of Hartford: In order that you may be on your guard against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. I refer to Donaghue Brothers, consisting of William and Edward Donaghue. I have been in the habit of buying nearly all my goods of them, but because I quit buying of them, they went to the savings bank, of whom I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease, served a notice on me to immediately vacate. The firm is not worthy of our support, being guilty of foul and unfair dealings to get square, as they say, with one who exercises the right to trade where he likes, and I sincerely believe they deserve that kind of warfare known as 'boycotting,' and request those who believe in the fair thing as between man and man, to give their support to some other house. For further particulars call on the undersigned. J. H. GAFFY." In an action for a libel in this publication, in which the damage alleged was to the joint business of the plaintiffs, it was held—1. That evidence of the mental suffering of the individual plaintiffs was not admissible. 2. That if the libel could be construed as against the separate individuals of the firm, and the complaint had so charged, a joint suit could not have been maintained. 3. That the words were not actionable *per se*. 4. That the smallness of the damages recovered in the court below was not a reason for not granting a new trial to the defendant, because all the damages allowed by the jury appeared to have been for mental suffering, so that the trial resulted in a judgment wholly erroneous. *Donaghue v. Gaffy*, 43.
2. In a suit for a libel the truth of the matter published must be specially set up in the defense, if the defendant wishes to take advantage of it, either for justification or mitigation of damages. *Ib*.
3. And it makes no difference that the matter published is not a libel *per se*, so long as it shows on its face personal animosity equivalent to actual malice. *Ib*.
4. This has been the long established rule, and there is nothing in the Practice Act to change it. *Ib*.

LIEN.

Money borrowed by an association for constructing a park held not to be a special fund on which the parties who had furnished labor and material for the park had a lien, although the association had no other property, and had since gone into insolvency; no such lien having been agreed upon, and the money having been used in good faith in paying the note given for the loan. *Myers v. Jacques*, 517.

See FALSE REPRESENTATION, 1, 2.

LIMITATIONS (STATUTE OF.)

See MONEY PAID, 2.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MISTAKE (MUTUAL.)

The plaintiff sold the defendant a cow, for which he was to pay one hundred dollars if she was with calf and forty dollars if she was not. Six

months later both parties concluded that she was not with calf, and in settling another matter in which the plaintiff was to pay the defendant fifty dollars, he turned in the cow at forty dollars and paid ten dollars in cash. Afterwards the cow proved to have been with calf at the time of the sale. Held that the plaintiff was entitled to recover the remaining sixty dollars for her. *Newell v. Smith*, 72.

MONEY PAID UPON REQUEST.

1. The plaintiff, as conservator, borrowed \$600 of T., to use for the benefit of the ward, and mortgaged the real estate of the ward to T. as security. The ward afterwards died, and his heirs sold the land to the defendant for \$1,000, of which he paid \$400 in cash, and agreed to pay the remaining \$600 by paying the debt of that amount to T. The defendant paid the interest on the debt to T. annually for five years, when it was discovered that the mortgage was invalid, and he refused to make further payment on the debt, and the plaintiff, as maker of the mortgage note, was compelled to pay it. The heirs, grantors of the defendant, then assigned to the plaintiff their claim on the defendant for the \$600 of the purchase money not paid. Held that the debt to T. had become the defendant's debt, and that when the plaintiff, as maker of the note, was compelled to pay it, he was in law paying money for the defendant's benefit at his request. Also that the heirs had a valid claim on the defendant for the amount as so much of the purchase money unpaid, and that the plaintiff could recover it as their assignee. *Tuttle v. Armstead*, 175.
2. More than six years had elapsed, after the agreement of the defendant to pay the mortgage note, before the bringing of the suit. Held that his payment of interest on the note prevented the running of the statute of limitations against the claim. *Ib.*

MORTGAGE.

A promise to pay a mortgage is a promise to pay the mortgage debt. *Tuttle v. Armstead*, 175.

See RAILROAD COMPANY, 3 to 8.

NEGLIGENCE.

1. The defendant owned a factory set back ten feet from the line of a city street, and running along the street eighty-eight feet, with the space in front paved like the adjoining sidewalk and of the same grade. In front of the factory was a porch extending a little way towards the street, with a door in it, used as the main entrance, and by the side of the porch a depressed area extending along the building, about ten feet long, three feet wide and five deep, with no railing to protect persons from falling in. The plaintiff on a lawful errand undertook to go in the evening from the street to the porch, and, without want of care, fell into the open area and was injured. Held that the defendant was liable. *Crogan v. Schiele*, 186.
2. Where a person has so made the way leading to a building on his premises as to invite people to pass along the way to such building, he is bound to keep the way clear of dangers. *Ib.*
3. And it is not necessary in such a case that the person using the way should be a traveler on the highway. *Ib.*
4. The question of negligence is a mixed question of law and fact. Where the court requires of a defendant some act which the law did not

require, it is an error of law and can be reviewed. Where the court finds that the defendant failed to do some required act, it is a finding of fact and cannot be reviewed. *Nolan v. N. York, N. Hav. & Hartford R. R. Co.*, 461.

5. Combined facts do not make a case of negligence where each fact by itself 'does not involve a neglect of duty. *Ib.*
6. The care which a plaintiff must have exercised to be free from the imputation of contributory negligence, is reasonable care, which is that degree of care which may reasonably be expected from a person in his situation. *Ib.*

See DEMURRER, 1; HIGHWAY, 4, 5.

NEW TRIAL.

1. Where in assessing the damages the court below found the actual damage to be \$161, and included in the judgment \$10.59 as interest on that sum to the date of the judgment, it was held that whether the interest was properly included or not, the sum was too small to justify the granting of a new trial for the error. *Brown v. Town of Southbury*, 212.
2. Upon the trial of an action of ejectment it had been an important question affecting the title whether the father and mother of the plaintiff had ever been married, and the plaintiff had introduced a certificate of their marriage purporting to be signed by a certain magistrate since deceased, and by *E* and another as witnesses. The defendant also introduced witnesses who testified that in their opinions the certificate was not that of the magistrate; but the jury had rendered a verdict for the plaintiff. The defendant brought a suit for a new trial on the ground of newly discovered evidence, alleging that he had found several witnesses who would testify that *E* was in Louisiana at the time the certificate was dated, and several others who would testify that one *L*, at the request of the plaintiff's father, wrote the certificate and signed the name of the magistrate to it. Held that, while it is a general rule that a new trial will not be granted for newly discovered evidence that is merely cumulative, yet such direct evidence of the forgery was something so unusual that the defendant could not have been expected to inquire after it, while it was so apart from the ordinary mode of proving a forgery that it could not properly be regarded as merely cumulative. *Knowles v. Northrop*, 360.
3. And the discrediting of the certificate by proof of the absence of *E*, whose name was appended as one of the witnesses, was regarded as standing upon the same ground. *Ib.*

NOTES AND BILLS.

1. A negotiable note payable in six months and indorsed by the payees was delivered by the latter to a savings bank as collateral security for a loan previously made, with the following indorsement upon it, signed by the indorsers:—"We hereby acknowledge the receipt of notice of protest on the within note." Held that the word "protest" included all acts necessary to hold indorsers, and that the legal effect of the acknowledgment was to release the bank from all obligation to make demand of payment or give notice of non-payment. *City Savings Bank v. Hopson*, 453.
2. Another note delivered to the savings bank at the same time and for the same purpose, was on demand and indorsed as follows:—"For value

received we guarantee the within note till paid." Held to be an absolute and unqualified contract of the signers of the guarantee, to pay the note if the maker did not, without demand on the maker or notice of non-payment. *Ib.*

3. The maker of the note, a manufacturing corporation of which the indorsers and guarantors were stockholders, was solvent at the time the notes were given, and remained so for a year and a half from that time, but then became insolvent and so remained. The savings bank had taken no legal steps for the collection of the notes, and the other parties had not requested it to do so, or taken any measures themselves for their collection. Held that the savings bank was not to be charged with the loss. *Ib.*

OPINIONS OF SUPREME COURT (PUBLICATION OF.)

1. The act of 1882 (Session Laws 1882, p. 187) provides that the reports of the decisions of the Supreme Court of the state shall thereafter "be published by the state, under the supervision of the comptroller, who shall cause the volumes to be stereotyped, and copyrighted in the name of the secretary of the state." The comptroller made a contract with Banks & Brothers for the printing and selling by them at a price named of the next five volumes, the contract providing that they should take out a copyright on each volume in the name of the secretary for the benefit of the state, and that the volumes should be stereotyped, the plates to belong to the state and Banks & Brothers to have the exclusive right to print from them. Before the contract had expired certain publishers of weekly law magazines applied to the court for an order that the reporter should furnish them copies of all opinions as they were filed with him, on their request and payment therefor, for immediate publication in their magazines. Motion denied, on the ground that it would be a violation of the rights of Banks & Brothers under their contract. *Gould v. Banks*, 415.
2. The judges and the reporter being paid by the state, the product of their mental labor is the property of the state, and the state has power to take for itself a copyright of it, and it is for the state to say when and in what manner the decisions of the court shall be published. *Ib.*
3. The taking of the copyright does not offend the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the judges for their determination in a particular case constitute no part of the record therein; and these are accessible to all who desire to use them in the enforcement of their rights. *Ib.*

PARTNERSHIP.

1. In the case of non-trading partnerships the individual partners have not the same implied authority as in commercial partnerships to bind the firm by notes executed in the name of the firm. *Pease v. Cole*, 53.
2. In such a case the presumption of want of authority may be overcome by proof of express authority or of such a state of facts as justly implies authority. *Ib.*
3. These facts may be a course of conduct on the part of the firm, the usage of similar partnerships, the necessities of the business, or a ratification of the act by receiving the benefit of it. *Ib.*
4. A partnership formed for conducting a theater is one of the non-trading class. *Ib.*

5. How far a *bond fide* holder of a promissory note thus executed is affected by the character of the partnership where he had no knowledge on the subject: *Quære. Ib.*
6. Whether the note of a non-trading partnership, made by one of the partners, for a debt of the firm, would not be binding on the firm: *Quære. Ib.*

PAUPER.

See SETTLEMENT.

PAYMENT.

W, a district school teacher, received for a month's salary an order of the committee on the district treasurer, and transferred it, indorsed in blank, to a third person, who in good faith paid him the money for it. This had been the usual mode of monthly payment for two years that *W* had been employed by the district, and the delivery of the order was so understood by both parties. The district, before the order was presented to the treasurer and before it had received notice of the transfer, was garnished as the debtor of *W*. Held that the delivery of the order operated as payment, and that the district was not indebted to *W* at the time of the service of the factorizing process. *Seymour v. Over-River School District*, 502.

PERPETUITY.

See WILL, 12, 19.

POLICE COMMISSIONERS.

1. The police commissioners of the city of New Haven are agents of the state, engaged in performing public and governmental duties, and are not agents of the city or engaged in any matter of municipal concern. *Perkins v. City of New Haven*, 214.
2. The law having imposed upon these commissioners the duty of providing voting places in the city and town for all national and state elections, they can not, by hiring rooms for the purpose, bring the city under an obligation to pay the rent for them. *Ib.*

POSSESSION.

See RETENTION OF POSSESSION.

PRACTICE.

1. Where *A* has a claim to an account of income from certain property against *B* down to a certain date, and from that date against *C*, the grantee of *B*, he cannot join *B* and *C* as co-defendants in the same suit. The liability of *B* to account not extending beyond his sale of the property to *C*, there could be no joint liability. *Patterson v. Kellogg*, 38.
2. This could not have been done before the passage of the Practice Act, and nothing in that act authorizes it. *Ib.*
3. A cemetery association instituted a proceeding under the statute for enlarging its territory by taking adjoining lands owned in severalty by different persons. Held that all the owners, though having no joint interest, were properly made defendants together. *Evergreen Cemetery Association v. Beecher*, 551.
4. Where the allegations of a complaint or defense, which are manifestly insufficient in substance, are yet traversed and found true on the traverse, it does not necessarily follow that the party in whose favor the issue is found is entitled to judgment. *Todd v. Munson*, 579.

5. The case of *Powers v. Mulvey*, 51 Conn. R., 432, explained. *Ib.*
See ERROR, 1; EVIDENCE, 6.

PRACTICE ACT.

The Practice Act, in both spirit and letter, requires that all formal and technical objections be made known as early as practicable, that the plaintiff may amend or proceed anew, and that the parties may, as expeditiously and inexpensively as possible, reach and settle the controversy on its merits. *Donaghue v. Gaffy*, 43.

PRIVILEGED COMMUNICATION.

See ATTORNEY, 1.

PROBATE APPEAL.

The Superior Court in a probate case brought before it by appeal, can exercise no equity powers that the probate court could not have exercised. *Hewitt's Appeal from Probate*, 24.

PROBATE COURT.

1. A court of probate has no power to administer equities in making its decrees, except where they are directly involved in the matter upon which it is acting. *Hewitt's Appeal from Probate*, 24.
2. Where a woman who had a right of dower in lands of her deceased husband, had allowed the lands to be sold at auction as free from the incumbrance of dower, and had so stated to the purchaser, who paid the full price for the lands as free from dower, it was held that, upon her application made afterwards to the probate court to set out her dower, that court had no right to consider the question whether she was estopped from claiming dower by reason of the representation. *Ib.*
3. The equity here was wholly between the widow and the purchaser, who was a stranger to the estate, and did not grow out of the relation of the widow to the estate. *Ib.*
4. A judge of probate has no power to direct that money in the hands of a third party due to a ward shall be paid to the conservator to satisfy a balance due the conservator. Such a direction is not a judicial order, and would be invalid as not within the jurisdiction of the court. *Brown v. Egggeston*, 111.

PROMISSORY NOTE.

See NOTES AND BILLS.

PROPERTY TAKEN UNDER EMINENT DOMAIN: DISCONTINUANCE OF PROCEEDINGS.

1. A borough authorized to establish water works and to take by purchase or appraisal any property necessary for the purpose, voted to procure its supply of water from a certain stream at a certain point where the dam would set the water back upon and destroy a mill privilege of the plaintiffs. The borough purchased the land necessary for the dam, but not being able to agree with the plaintiffs as to the amount to be paid them for their mill privilege, had the same legally appraised, the appraisers fixing the sum at \$3,000. Nothing further was done by the borough toward the erection of the dam and one year after the above vote was passed the borough rescinded it and abandoned the project and gave notice of the fact to the plaintiffs. Held that the plaintiffs could not recover the \$3,000. *Stevens v. Borough of Danbury*, 9.
2. And held that the plaintiffs could not recover the counsel fees and other expenses incurred in the hearing before the appraisers. *Ib.*

PUBLIC USE.

See CEMETERY ASSOCIATION, 2, 3; RAILROAD COMPANY, 9.

RAILROAD COMPANY.

1. Where a railroad company is chartered with power to take private property and to construct and operate its road, the authority given is in the first instance permissive merely, and no obligation rests upon the company to exercise the powers granted. *Gates v. Boston & N. York Air Line R. R. Co.*, 333.
2. But where the company has taken private property and constructed its road, it has come under an obligation to carry into effect the objects of its charter, and its capital stock, franchises and property stand charged primarily with this public trust. *Ib.*
3. Where such a company is empowered to issue bonds and secure them by a mortgage of its franchise and all its property, the mortgagees take the mortgage subject to this trust. *Ib.*
4. Where such a company fails and the mortgage has to be foreclosed, the legislature has full power to authorize the bondholders, by a vote of a majority, and with an equal opportunity to all, to reorganize as a new corporation, with the rights of the old corporation, such authorized action being merely a mode of securing the performance of the paramount public trust. *Ib.*
5. And a dissenting minority have no private rights that can be successfully asserted against such action. *Ib.*
6. Where a mortgage was given to secure a large amount of coupon bonds which were to run twenty years, and contained a provision that they might be considered due by any bondholder on default of interest for six months and that the mortgage might then be foreclosed, it was held that each bondholder took his bond subject to this right of his co-bondholders, and could not, by electing not to have his own bond become due, obstruct the action of the majority. *Ib.*
7. Where the mortgage is made, under a provision of the charter, to the treasurer of the state, in trust for the bondholders, the treasurer in executing his trust may exercise a wide discretion within the scope of his powers. *Ib.*
8. And any bondholder, having no notice of the proceedings taken by the treasurer and by the majority of the bondholders with regard to the foreclosure of the mortgage and reorganization of the company would yet be regarded as a party to them, represented by the trustee and the other bondholders. *Ib.*
9. There is no reason why, subject to legislative and judicial control, the majority in interest in common property, indivisible in its nature, consecrated to public use, should not so use the property as to advance the private interests in it and promote the public use. *Ib.*
10. The bondholders of a railroad company were, after foreclosure of a trust mortgage of the road, incorporated as a new company to succeed to all the rights of the old, with a provision that the capital stock should be forty thousand shares, of which thirty thousand should be preferred and ten thousand common stock, and that no dividend should be made on the common stock until after one of seven per cent. had been made on the preferred. The charter of the old company gave it power to lease the road to any other connecting company; that of the new com-

- pany requiring a vote of three fourths for the purpose. Held that the company had power, by a three fourths vote, to lease the road for ninety-nine years to a connecting road at a fixed annual rental. *Town of Middletown v. Boston & N. York Air Line R. R. Co.*, 351.
11. And the court refused to set aside such a lease although the entire rental was but four per cent. on the preferred stock, and was to go, not to the company, but directly to the preferred stockholders as a percentage on their stock. *Ib.*
 12. By the defendant company's charter the old bondholders were authorized to convert their bonds into its stock. The plaintiff town was a holder of some of the common stock. Held that it could not, in its suit to set aside the lease, avail itself of the fact that some of the bondholders of the old company had not exchanged their bonds for stock and denied the validity of the organization of the new company. *Ib.*
 13. Nor of the fact that no provision was made in the lease for the payment of certain creditors of the company. *Ib.*
 14. Injuries to bondholders or creditors can be shown and redressed only when they complain of them. *Ib.*
 15. The act of 1884, (Session Laws, 1884, ch. 100,) provides that the railroad commissioners, when public safety requires an alteration of any highway crossed at grade by a railroad, "may order such alterations in such highway as they shall deem best." Two converging highways crossed a railroad at grade at points half a mile apart and united just beyond the road. Held that the commissioners had power to join the two highways before reaching the railroad and make a single crossing, although the distance by one highway was increased thirty rods and by the other fifteen rods. *Town of Suffield v. New Haven & Northampton Company*, 367.
 16. While the commissioners have authority to make such alterations as they think best, yet their action is open to review upon the question whether, considering all the circumstances, it comes within the statute. *Ib.*
 17. A boy of sixteen was employed by the keeper of a restaurant at a station on the defendant's railroad to sell sandwiches and fruits on the trains, and had a free pass for the purpose over the whole road, the pass containing a condition that the company should not be liable for any personal injury caused by the negligence of its agents. The boy for a private purpose was going over a part of the road to which he was not called by his business, and while there was killed by a collision caused by the gross negligence of the defendant's servants. The company had no interest in the restaurant and had assumed no obligation to carry the boy over the road, but was incidentally benefited by the accommodation to its passengers, and to induce the keeper to establish it there had promised to aid him in every way it could, and gave the boy the pass as a means of aiding him. Held—1. That the pass was to be regarded as given gratuitously and not upon consideration. 2. That the condition in such a pass as to the company's exemption from liability for the negligence of its servants, was not forbidden by public policy and was obligatory upon the passenger. 3. That the boy, having capacity to accept the free pass, took it with the condition, and was as much bound by it as an adult. *Griswold v. N. York & N. Eng. R. R. Co.*, 371.

15. A condition exempting a railroad company from liability for the negligence of its servants, is not void as against public policy by reason of a moral culpability involved. The company itself may be without actual fault in the matter. *Ib.*
19. Such a condition would not be good in the case of a passenger for hire. *Ib.*
20. A passenger on a free pass given for a valuable consideration has the same rights as a passenger for hire. *Ib.*
21. A railroad company should always be vigilant to prevent accidents, but owes no duty, as such, to run its trains so as to prevent accidents to persons unnecessarily and unlawfully on its tracks. *Nolan v. N. York, N. Haven & Hartford R. R. Co.*, 461.
22. But the law requires of a company that the engineer in charge of a train shall, after the danger of an accident is discovered, do all he can to prevent it. *Ib.*
23. A railroad company is not bound, in the absence of any statutory requirement, to fence its road in such a way as to keep children from getting upon its tracks. *Ib.*
24. The fact that a child is but seven years of age does not create a duty towards him on the part of the company that would not otherwise have existed. Precautionary measures, having for their object the protection of the public, must as a rule have reference to all classes alike. *Ib.*

REMAINDER INTEREST.

See *EQUITY*, 1; *WILL*, 3.

RETENTION OF POSSESSION.

1. A vendee who takes possession at a time subsequent to the sale, but before the rights of creditors have accrued by attachment or otherwise, can hold the property against creditors. *Gilbert v. Decker*, 401.
2. The retention of possession raises a presumption of fraud only in favor of attaching creditors or those who stand in their position. *Ib.*
3. The presumption of fraud does not exist in the case of the sale of property exempt from execution. *Ib.*

RETURN OF GOODS PURCHASED.

1. The defendant ordered of the plaintiff a quantity of hats and caps of specified sizes, the price being regulated by their price per dozen and each class being ordered as so many parts of a dozen. The goods were sent with a bill which corresponded with the order. The defendant kept them a month before opening the boxes, when he discovered that some of the caps were not of the size required by the order and indicated by the labels on them. Held that he might, within a reasonable time, return such of them as did not answer the order. *Cohen v. Pemberton*, 221.
2. And that he was not bound to return the entire quantity of any particular class of the caps, the designation of them in the order as parts of dozens being for convenience and not intended to make the contract as to each class an entirety. *Ib.*
3. What is a reasonable time for the return of the goods in such a case is a question of fact, depending on the circumstances. *Ib.*
4. The bill sent by the plaintiff with the goods had the following printed heading:—"All claims must be made within three days after the receipt

of the goods." Held, as the case stood, to be no part of the defendant's contract. *Ib.*

RIGHT OF WAY.

The plaintiffs, while carrying on the grocery business in a store leased by them, took from the defendant a deed of a right of way from the street to the rear of the store, which contained the following limitation:—"To hold said right of way so long as they shall occupy said building for the grocery business now carried on by them." They afterwards failed and a corporation was formed to carry on the business, which purchased the stock of goods and the lease and employed the plaintiffs to assist in conducting the business, one of them being made chief manager. The plaintiffs were not stockholders of the company, and were not carrying on the business on their own account under cover of the corporation. Held that the right of way ceased when the plaintiffs ceased to carry on the business as owners of it. *Hall v. Armstrong*, 554.

SALE.

See RETURN OF GOODS PURCHASED, 1, 2, 3, 4.

SALE (CONDITIONAL).

The plaintiffs and defendants made a contract by which the plaintiffs were to sell the defendants a complete set of a certain work for ninety dollars, the defendants paying twelve dollars on delivery of the books and six dollars every other month thereafter until the whole was paid; the right of property to remain in the plaintiffs till the whole was paid, and on failure to pay any installment within thirty days after due, all remaining installments were immediately to become due and payable; the plaintiffs having the option to take back the books and to retain all the installments previously paid. Held that the right to take back the books was one that belonged to the plaintiffs alone and did not give the defendants the right to return them; that the agreement of the defendants to take and pay for the books was absolute; and that on default of payment of any installment the plaintiffs had a right to sue for and recover the whole of the ninety dollars that remained unpaid. *Appleton v. Norwalk Library Corporation*, 4.

SCHOOL DISTRICT.

See WARNING OF MEETING, 1, 2.

SCHOOL TEACHER.

1. The reasonableness of the punishment administered by a school teacher to a pupil is purely a question of fact. *Sheehan v. Sturges*, 481.
2. A school teacher has a right to require obedience to reasonable rules and a proper submission to his authority, and to inflict punishment for disobedience. *Ib.*
3. In the absence of rules established by the school board or other proper authority, the teacher has a right to make all necessary and proper rules for the regulation of the school. *Ib.*
4. In inflicting corporal punishment the teacher must be governed, as to the mode and severity of it, by the nature of the offense, and by the age, size, and physical condition of the pupil. *Ib.*
5. Where a boy has been habitually refractory and disobedient the teacher in punishing him for a particular offense may take into consideration his habitual disobedience. *Ib.*

6. And it is not necessary that he should inform the pupil at the time that he is punishing him for his past as well as present misconduct. *Ib.*
7. A district school teacher is not a public officer within the meaning of the law exempting the salaries of such officers from attachment. *Seymour v. Over-River School District*, 502.
8. Nor is he an officer in the ordinary sense of the term. He is simply in the employment of the district. *Ib.*

SET-OFF.

1. The defendant occupied, under the plaintiff as administrator, certain real estate that belonged to the estate of the intestate. Held that he could not set off a debt due him from the intestate in his lifetime, against a claim of the plaintiff for the rent. *Harris v. Taylor*, 500.
2. And held that it did not affect the case whether the estate was in settlement as a solvent or insolvent estate, nor whether, if in settlement as a solvent estate, it was in fact solvent or insolvent. *Ib.*

SETTLEMENT.

1. *D.*, an alien, came to the defendant town to reside and was there naturalized and made a voter in 1859, and for six years thereafter supported himself and family there and paid his taxes. Whether he acquired a legal settlement there: *Quære. Town of Vernon v. Town of Ellington*, 330.
2. By his naturalization he became a citizen of the United States and of this state and by his subsequent residence in the defendant town became an inhabitant of that town. *Ib.*
3. From the defendant town he removed, as an inhabitant of that town, to the plaintiff town in 1866, where he resided until his death in 1876, supporting himself and family and paying his taxes. Held that he acquired a settlement in the plaintiff town. *Ib.*

STATUTES COMMENTED ON.

- STATE CONSTITUTION, art. 6, sec. 5, (board of registration.) *Perry v. Reynolds*, 527.
- GEN. STATUTES, tit. 15, ch. 1, sec. 4, (settlement.) *Vernon v. Ellington*, 331.
- Id.*, tit. 18, ch. 11, sec. 18, (security for remainder interests.) *Security Co. v. Hardenburgh*, 169.
- Id.*, tit. 19, part 3, secs. 1, 4, (bastardy suit.) *Naugatuck v. Smith*, 523.
- SESSION LAWS OF 1882, ch. 35, (opinions of Supreme Court.) *Gould v. Banks*, 415.
- Id.*, ch. 50, sec. 4, (finding of facts by judge.) *Johnson v. Higgins*, 236.
- Id.*, ch. 51, (claim on executor or administrator.) *Brown v. Eggleston*, 110.
- Id.*, ch. 107, part 4, sec. 2, (licensed vendor of liquors convicted of illegal sale.) *Quintard v. Knoedler*, 485.
- Id.*, ch. 107, part 6, sec. 4, (sale of liquors to a minor.) *State v. McMahon*, 407.
- SESSION LAWS OF 1883, ch. 105, (notice to town of injury on highway.) *Brown v. Southbury*, 212.
- SESSION LAWS OF 1884, ch. 100, sec. 1, (alteration of highway by railroad company.) *Suffield v. New Haven & Northampton Co.*, 367.

SESSION LAWS OF 1885, ch. 8, sec. 1, (judge making finding after term expires.) *Johnson v. Higgins*, 238.

Id., ch. 102, (evidence objected to.) *Dougherty v. Welch*, 558.

STATUTE OF FRAUDS.

A parol promise to pay the debt of a third person, to bring it within the statute of frauds, must be a promise to pay the promisor's own money.

A promise to pay such a debt with the promisee's money in his hands is not within the statute. *Tuttle v. Armstead*, 175.

SUPREME COURT (PUBLICATION OF OPINIONS OF)

See OPINIONS OF SUPREME COURT.

TRADE MARK.

1. In 1858 two brothers named Rogers formed a copartnership for making silver-plated spoons, forks and knives, under the name of "Rogers & Brother," and in the following year a corporation was organized by them of the same name and for the same business, they being the principal stockholders. The firm and afterwards the corporation had adopted and used as a trade-mark, stamped upon the backs of the articles made, "Rogers & Bro. A. 1." In 1883 the defendants, a firm consisting of three partners of the name of Rogers, one of them being C. B. Rogers, under the name of "C. Rogers & Bros.," previously engaged in the making of other plated ware, entered upon the same manufacture and stamped upon their ware in the same way the following trade-mark, "C. Rogers & Bros., A. 1." It was found that the word "Rogers" had for a long time been the conspicuous and valuable thing in various trade-marks used by different concerns upon such goods, and that the defendants in commencing the manufacture had in view the popularity in the market of plated goods bearing a stamp with that name, but that they used the stamp to designate their own manufacture and there was no intentional misrepresentation on their part. It also appeared that the mark "A 1" was in common use as a designation of the quality of goods. It was also found that the plaintiff's goods bore a very high reputation in the market; also that the defendants' trade-mark would without difficulty be distinguished from the plaintiffs' by dealers in the articles, and by retail buyers who looked beyond the word "Rogers," but that retail buyers who regarded only that word would be liable to confound one with the other. In a suit for an injunction against the use by the defendants of the trade-mark "C. Rogers & Bros.," and also against the use of the word "Rogers" in any trade-mark upon such goods, it was held that an injunction ought not to be granted against either. *Rogers & Brother v. Rogers*, 121.

2. A manufacturer has the right to use his own name as a mark upon his goods although it be the same name with that of another manufacturer of the same goods, who makes the name a part of his own trade-mark, where there is no false representation in such use; and the majority of the court regarded the absence of all fraudulent designs and acts as established by the finding of facts in the court below. *Ib.*

TRUST.

1. An express trust in real estate can not be proved by parol. *Todd v. Munson*, 579.

2. In suits to enforce contracts, correct mistakes, and punish or prevent

frauds, it is often necessary to show incidentally an express trust by parol. The distinction is between such cases and those that are brought simply to establish or enforce a trust. *Ib.*

3. Declarations made by a grantor with regard to an intended trust some time after the deed was given, are entirely inadmissible as not even tending to show an arrangement for a trust at the time when the deed was given. *Ib.*
4. A complaint alleged that a conveyance of certain real estate was made to the defendant "without consideration and upon the parol condition and understanding between herself and the grantor that she should hold an undivided half of it in trust for T., and after the grantor's death should sell it and give half the proceeds to T." Held not demurrable on the ground that the agreement of the grantee was alleged to be by parol, as the grantee, having received the benefit of the grant, could be compelled to perform the agreement on her part. *Ib.*

VERDICT.

1. Where there are several counts embracing distinct and independent causes of action, it is the duty of the court, if requested by either of the parties, to direct the jury to bring in separate verdicts on the separate counts. *Johnson v. Higgins*, 236.
2. A general verdict will ordinarily suffice to ascertain and fix the particular rights in issue, and where it will is proper. *Ib.*

WARNING OF MEETING.

1. A school district meeting was called "for the purpose of obtaining information with regard to the recent assessments upon the property in the district." At the meeting a vote was passed appointing a committee to make the investigation, with power to employ counsel. The committee employed counsel, who instituted certain legal proceedings. Held that the warning of the meeting did not authorize a vote under which legal proceedings could be instituted, and that the district was not liable for the services of the counsel employed. *Wright v. North School District*, 576.
2. A later meeting was called "to take action with regard to rescinding the doings" of the former meeting, at which it was voted not to rescind. Held that, as the original vote was itself illegal, no inhabitant of the district was under the necessity of attending a meeting for the purpose of rescinding it, while the vote not to rescind could not give effect to the original vote. *Ib.*

WAY.

See RIGHT OF WAY.

WILL.

1. A testator by his will gave one million dollars to B, his son-in-law, in trust "to pay the income therefrom, or such portion thereof as he may think best, and at such times as he sees fit, to my granddaughter C. B. during her life." The granddaughter was the daughter of B, and an infant. The will further provided that the bequest should be payable to B within one year from the testator's death at the convenience of the executors, who were authorized to pay it in stocks or bonds belonging to the estate at their cash value, or in cash, as might be preferred. Held that the bequest did not carry interest until the end of a year from the testator's death. *Bartlett v. Slater*, 102.

2. The gift of the income from the money was not a gift of an annuity. *Ib.*
3. A testatrix gave one half the residue of her estate to *M*, the wife of *C*, with a provision that if her husband should be indebted to the testatrix at the time of her death, her executor should transfer the indebtedness to *M* as a part of her share of the residue; and that if *M* should die before him the property given her should go to such of her children as should be alive at the time of the decease of the executrix, the share of any deceased child to go to its children, if any. Held—1. That the gift to the children did not depend upon the contingency of *M*'s dying before the testatrix. 2. That *M* took a life estate during the life of her husband, with a vested remainder in her children liable to be defeated by her surviving her husband. 3. That the interests of the children should be protected by requiring security of *M* that the property should be forthcoming at her death, if she should not survive her husband. 4. That the notes of her husband for his indebtedness to the testatrix stood upon the same ground with the other property, as affecting the amount of the bond to be given. 5. That it was the duty of the executor to collect the interest on the notes as it fell due, and to keep all the property going to *M* under the bequest prudently invested, and to pay over the income to *M*. *Security Co. v. Hardenburgh*, 189.
4. A testator gave property in trust, to be paid over at a time fixed as follows: "To my grandchildren, children of my son *N*, or to such of them as shall be living, to be equally divided between them." *N* had then four children, but a fifth was born before the time fixed for the distribution of the trust property. Held that the children of *N* took as a class, and that the after-born child was entitled to share with the others. *Webster v. Welton*, 183.
5. An earlier clause of the will gave \$5,000 each "to my grandchildren, *O*, *A*, *W* and *E*, children of my son *N*." Held not to be a sufficient reason for giving a construction to the later clause above mentioned, limiting its application to the four children of *N* living at the testator's death. *Ib.*
6. A testatrix by one clause of her will gave all her property without qualification to *A. G. S.*, the will concluding as follows:—"I appoint my husband, *J. G.*, executor of this will, who is to have his support out of the property, and may dispose of any or all of it if necessary for his support. All that remains at his death is to be given, as written above, to *A. G. S.*—she to have the control and use during her life." Held—1. That the interest of *A. G. S.* was only a life estate, to commence at *J. G.*'s death. 2. That *J. G.* was entitled to the possession and control of the property during his life. 3. That his right to use the property for his support included also the right to support from it a wife whom he afterwards married. *Webb v. Goodnough*, 218.
7. The will gave the property at the decease of *A. G. S.* to her son *J. S.*, he to have possession when of age, and if other children were born to her, they to share equally when of age. *J. S.* died, but a later-born brother *R. S.* survived him. Held that the remainder vested in *R. S.*, subject to open and let in after-born children. *Ib.*
8. A testator made the following bequest:—"I authorize my executrix to disburse from my estate to such worthy persons and objects as she

may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all five thousand dollars." Held to be invalid. *Bristol v. Bristol*, 242.

9. If the gift had been of the amount to her, with authority thus to use the money, it would have been valid. *Ib.*
10. It could not be made a trust, as the beneficiaries were wholly uncertain and the payment to them left wholly to the pleasure of the executrix. *Ib.*
11. A gift of personal property that lapses goes to the residuary legatees. *Ib.*
12. The testator, after making sundry bequests, gave all the residue of his estate to certain trustees and their successors, as a permanent fund, the income of which was to be applied as follows:—An annuity of one hundred dollars to *E. C.* for her life; of the remaining income, one half to the New Haven Orphan Asylum, one eighth to the New Haven Home of the Friendless, and one eighth to the Connecticut Humane Society, with the following provision as to the remaining quarter:—"I authorize, empower and direct my wife to permanently dispose of the same for such charitable purposes as she may deem proper." Held—
 1. That this provision was void for uncertainty as to the charitable purposes intended, while it could not take effect as a gift to the wife.
 2. That the bequest was not saved by a written designation made by the widow of certain charitable purposes which she selected.
 3. That the invalidity of the disposition of this quarter of the income, did not invalidate the gift of the other three quarters.
 4. That the quarter of the fund, the disposition of the income of which was held invalid, went to the heirs at law as intestate estate.
 5. That the heirs would take a quarter of the principal of the fund and not of the income.
 6. That the annuity to *E. C.* with which the whole fund was primarily charged, could be apportioned, and three quarters of it assigned to the three quarters of the income going to the charitable societies, and one quarter to the quarter of the fund taken by the heirs.
 7. That the executors could retain an ample portion of the quarter of the fund going to the heirs, to secure the quarter of the annuity to *E. C.* *Ib.*
13. A testator gave a large estate to trustees upon the following trust:—
 - (1) Out of the net income to pay his widow during her life \$25,000 annually.—(2) To pay to each of his five children out of the net income \$5,000 annually during their lives.—(3) To pay to each of his grandchildren out of the income on their arriving at the age of twenty-one, \$5,000.—(4) During the ten years succeeding the death of the testator to allow the annual income, after the above payments, to accumulate, and to invest the accumulation as a part of the trust estate; and after the expiration of the ten years to pay two thirds of the net income annually to his children then surviving and the legal representatives of such as might have died, and allow the remaining third to accumulate and add it to the trust estate.—(5) At the decease of the last survivor of the children, if his widow should not then be living, but if living then at her death, the trust to cease, and all the estate to go to his grandchildren who should then be living, to be divided among them *per capita*; the children of any deceased grandchild to take the parent's share, and if any grandchild had died leaving a widow, but no children, such widow

to take one third the share her husband would have been entitled to if living. Held—1. That the grandchildren living at the time of the testator's death took a vested interest in the remainder of the trust estate. 2. That they took as a class—opening to let in after-born grandchildren, while, if any died before the time for distribution, without children and not leaving a widow, his title divested. 3. That the disposition of the property therefore did not conflict with the statute against perpetuities. 4. That the annuity to the children was payable to the family of a deceased child during the continuance of the trust. 5. That the gift of two thirds of the net income after the first ten years was in addition to the annuities previously given to the children and not a substitute for them. 6. That by "the legal representative" of children, under the fourth head, was meant those who would take under the statute of distribution, meaning the widow and heirs at law. *Farnam v. Farnam*, 261.

14. Where a son remains at home and performs services for his father under a general expectation that the latter will compensate him by his will and leaves the amount to his father's judgment, and the father does in fact make some provision for the son by will, the son is bound by the provision made, whether satisfactory or not. *Lee's Appeal from Commissioners*, 363.
15. A testator gave his wife the use for life or widowhood of his entire estate. By a codicil he gave \$1,000 each to two charitable societies. Held that the latter bequests were not subject to the life estate of the wife, but were to be paid at the usual time. *Beardsley v. Selectmen of Bridgeport*, 489.
16. The testator directed that after his wife's marriage or death his whole estate should "be used at discretion by the acting selectmen of B for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans, residing in B, until all is expended." Held not to be void for uncertainty. *Ib.*
17. The question in such a case is, not whether there are not many persons concerning whom there must be doubts as to their meeting the requirements of the bequest, but whether there are not many concerning whom there can be no doubt as to their meeting them all. *Ib.*
18. The persons holding the office of selectmen of B were joint trustees, in perpetual succession, clothed with power and placed under obligation to select beneficiaries from the classes specified and apply either the income or the principal of the fund, at their discretion, for their relief. *Ib.*
19. A testator whose sole heirs at law were two daughters, gave the greater portion of his estate to trustees, to pay over the entire income to them for their joint lives, and to the survivor half the income for her life, and out of the other half two hundred dollars to each of the children of the deceased daughter, the balance of the income to be added to the principal; and on the death of the surviving daughter the whole property to be divided into as many shares as there should then be grandchildren of the testator, the children of a deceased grandchild to be counted as one and to take the parent's share per capita. Held—1. That the gift to the grandchildren was to be regarded as a several bequest to each, and as not vesting in right until the time of the

division of the property among them. 2. That the gift to the children of a deceased grandchild was void, as contravening the statute against perpetuities. 3. That the invalidity of that bequest invalidated the entire bequest to the grandchildren. 4. That the direction to add the balance of the income to the principal during the life of the surviving daughter was not so connected with the bequest to the grandchildren as to be in itself invalid. *Andrews v. Rice*, 566.

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ERRATA.

- VOL. 48. P. 266, 14th line from bottom—for "31 Conn." read "32 Conn."
- " In Index, at foot of page 625, insert "Payment—See Dogs, 1."
- VOL. 50. P. 32, 6th line from bottom -for "2 Swift" read "1 Swift."
- " P. 295, 4th line of head note—for "p. 434" read "p. 424."
- " P. 314, 9th line—for "18 Conn." read "20 Conn."
- " P. 319, 3d line from bottom—for "debtor" read "creditor."
- " P. 564, 14th line—for "every" read "any."
- VOL. 52. P. 522, 3d line of head note, strike out "it."

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